Supreme Court, U.S.
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No.

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In The

Supreme Court of the United States

October Term, 1996

JUAN RAMON MATTA-BALLESTEROS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the right of persons to be free from torture committed by agents of the United States is jeopardized by the decision below which adopted an incorrect legal standard for determining the quantum of evidence needed to establish government involvement in torture and which adopted an erroneous test for determining what kinds of acts constitute torture such as to require dismissal of an indictment in exercise of the court's supervisory powers.

II. Whether the decision of the Ninth Circuit holding that an indictment cannot be dismissed under the Due Process Clause of the Fifth Amendment is in conflict with the decision of this Court in *Rochin v. California*, the decision of the Second Circuit in *United States ex rel., Lujan v. Gengler*, and the decision of the District Court in *United States v. Manuel Antonio Noriega*.

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Juan Ramon Matta-Ballesteros respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit in Case No. 91-50336 (App. F, p. 46a) is reported at 71 F.3d 754. The memoranda opinions of the Ninth Circuit in Case No. 91-50053 (App. D, p. 8a) and Case No. 91-50165 (App. E, p. 24a) are not reported. The opinion of the District Court in Case No. 91-50336 [District Court No. CR-87-422-ER] (App. G, p. 85a) is also not reported.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment in Case No. 91-50336 on December 1, 1995. Rehearing was denied on October 15, 1996. (App. C, p. 5a). The Ninth Circuit entered judgment in Case No. 90-50053 on December 26, 1995. Rehearing was denied on October 8, 1996. (App.B, p. 3a). The Ninth Circuit entered judgment in Case No. 91-50165 on December 15, 1995. Rehearing was denied on October 8, 1996. (App. A, p. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND INTERNATIONAL PROVISIONS INVOLVED

United States Constitution: Amendment V. (U.S.C.A. Const. Amend V).

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Universal Declaration of Human Rights:
Article 5.
(G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc. No. A/810 (1948))

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

European Convention For the Protection of Human Rights and Fundamental Freedoms:
Article 3.
(Nov. 4, 1950, 213 U.N.T.S. 222)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment:
Part I, Article 1, Paragraph 1.
(UN General Assembly RES 39/46, Annex. Dec. 10, 1984, 23 I.L.M. 1027 (1984))

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture

(18 U.S.C. § 2340).

Definitions As used in this chapter

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged

> mental harm caused by or resulting from — (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality;

STATEMENT OF THE CASE

Petitioner, Juan Ramon Matta-Ballesteros, is a Honduran national who was kidnaped by United States Marshals and brought to the United States to stand trial on a series of federal indictments, including one alleging his participation in the abduction and murder of DEA agent Enrique Camarena.

As detailed more fully below, Petitioner challenged the jurisdiction of the courts in each of the cases on the grounds that he had been tortured by the government agents involved in his apprehension. On appeal from his convictions, the Ninth Circuit rejected this argument, finding that Petitioner had failed to make "a strong showing" that he had been the victim of "grossly cruel and unusual barbarities."

A. Course of Proceedings and Disposition in Court Below.

This petition arises from appeals to the United States Court of Appeals for the Ninth Circuit from convictions in three criminal cases in the District Court for the Central District of California. In each appeal, Petitioner raised the same jurisdictional argument, which argument was rejected in all three cases. The reasoning of the Ninth Circuit is found only in the published opinion, which reasoning was incorporated by reference in the other two memorandum opinions.

In Case No. 91-50336, petitioner was found guilty of (1) committing a crime of violence in aid of racketeering, in violation of 18 U.S.C. § 1959; (2) conspiring to kidnap a federal agent engaged in his official duties, in violation of 18 U.S.C. § 1201(c); and (3) kidnaping a federal agent engaged in his official duties, in violation of 18 U.S.C.§ 1201(a)(5). He was acquitted on charges of murdering a federal agent engaged in his official duties, in violation of 18 U.S.C. § 1111(a).

In Case No. 90-50053, Petitioner was found guilty of (1) one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. § 848; (2) one count of conspiracy to distribute and to possess with the intent to distribute cocaine, in violation of 21 U.S.C. § 846; and (3) five counts of distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1).

In Case No. 91-50165, Petitioner was found guilty of (1) one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848; (2) one count of conspiracy to import cocaine, in violation of 21 U.S.C. § 963; (3) one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; and (4) eight counts of aiding and abetting the distribution, or attempted distribution, of cocaine, in violation of 21 U.S.C. §§ 841 (a)(1) & 846 and 18 U.S.C. § 2.

Petitioner is serving a maximum sentence of life in prison without parole for the CCE offenses as well as lesser sentences for his conviction on the other charges.

B. Statement of Facts Relevant to this Petition.

On April 5, 1988, Juan Matta-Ballesteros was abducted from his home in Tegucigulpa, Honduras. With assistance from Honduran Special Troops, "four United States Marshals bound his hands, put a black hood over his head, thrust him on the floor of a car operated by a United States Marshal, and drove him to a United States Air Force Base in Honduras. The Marshals then moved him to the United States via the DominicanRepublic. Within twenty-four hours of his armed abduction Matta-Ballesteros was a prisoner in the federal penitentiary at Marion, Illinois." (App. F, p. 50a).

In proceedings below, Matta sought dismissal of charges on the grounds that during the course of his abduction to the United States he was tortured by his captors. At an evidentiary hearing, Matta testified that while being transported to the United States Air Force Base, he was beaten and burned with a stun gun at the direction of the Marshals. During his flight he was once again beaten and tortured by a stun gun applied to various parts of his body, including his feat and genitals. (App. F., p. 50a). Matta submitted pictures taken upon his arrival at the federal prison, a report on stun guns, and declarations by various persons who stated that they witnessed Matta being shocked with stun guns. (App. F, p. 57a). The court also heard testimony by two physicians who had examined Matta and who stated that they could not determine the cause of his injuries and by the agents involved in Matta's abduction who denied that he was tortured. (App. F, p. 57a).

The District Court denied Matta's motion to dismiss finding that he had failed to make " 'a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States' " and that " 'Defendant's allegations of mistreatment, even if taken as true, do not constitute such barbarism as to warrant dismissal of the indictment under the caselaw.' " (App. F, p. 56a-57a).

The decision of the District Court was affirmed on appeal. According to the Ninth Circuit:

> While we may have a suspicion of Matta-Ballesteros's inhumane treatment, and the evidence reasonably could support a finding that he was tortured, it could also support the conclusion of the district court. Because the district court'saccount of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it even though we may he convinced that, sitting as the trier of fact, we would have weighed the evidence differently.
>
> * * *
>
> Thus, much as we may want to dismiss this case through an exercise of our supervisory powers, to do so would be unwarranted. The district court did not abuse its discretion in refusing to exercise such powers.

(App. F, p. 57a-58a).

REASONS FOR GRANTING THE WRIT

I.

THE RIGHT OF PERSONS TO BE FREE FROM TORTURE COMMITTED BY AGENTS OF THE UNITED STATES IS JEOPARDIZED BY THE DECISION BELOW WHICH ADOPTED AN INCORRECT LEGAL STANDARD FOR DETERMINING THE QUANTUM OF EVIDENCE NEEDED TO ESTABLISH GOVERNMENT INVOLVEMENT IN TORTURE AND WHICH ADOPTED AN ERRONEOUS TEST FOR DETERMINING WHAT KINDS OF ACTS CONSTITUTE TORTURE SUCH AS TO REQUIRE DISMISSAL OF AN INDICTMENT IN EXERCISE OF THE COURT'S SUPERVISORY POWERS.

The right to be free from official torture is as fundamental a human right as the right to life and liberty. Yet this most fundamental of human rights is jeopardized by the decision of the Ninth Circuit below. In holding that a victim of torture must make "**a strong showing**" of grossly cruel and unusual barbarities, as a precondition to a court's exercise of its supervisory powers, the court imposed a burden of proof wholly unwarranted for this kind of inquiry and nearly impossible to meet. In holding that a victim of torture must make a strong showing of "**grossly cruel and unusual barbarities**," as a precondition of a court's exercise of its supervisory powers, the court announced a definition of torture in conflict with and indefensible under international law and the laws of the United States. Review of this decision by the Ninth Circuit is thus of critical importance if our courts are to uphold the right of persons to be free from official torture.

The right to be free from official torture is guaranteed by Article 5 of the Universal Declaration of Human Rights (G.A.

Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc. No. A/810 (1948)), and has been implemented by Article 3 of the European Convention For the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950, 213 U.N.T.S. 222) and Article 1 of the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly RES 39/46, Annex. Part I, Article 1, Paragraph 1.[1]

The right to be free from official torture is a *jus cogens* principle in international law. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) ("[W]e conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.") *Jus cogens* is "a peremptory norm of general international law . . . [which] is a norm accepted by the international community of States as a whole as a norm from which no derogation is permitted. . . ." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679.

In the instant case, the Ninth Circuit recognized that it possessed the authority to dismiss an indictment in the face of evidence of "government misconduct 'of the most shocking and outrageous kind.' " The Ninth Circuit further indicated that it would have dismissed the indictment in this case based upon the evidence of torture before it, but for the trial court's finding that the Petitioner had failed to make "a strong showing of grossly cruel and unusual barbarities," a determination which the Ninth Circuit held could not be deemed to be clearly erroneous.

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1. The United States Senate ratified the Convention in 1990, 136 Cong. Rec. § 10091 (July 19, 1990), the instrument of ratification was deposited with the United Nations in October of 1994, and the Convention entered into force for the United States in November 1994.

The Ninth Circuit was constrained to reach this result as a consequence of its erroneous adoption of "a strong showing" as the appropriate burden of proof and "grossly cruel and unusual barbarities" as the definition of torture. As we will see, these standards are completely unwarranted for the type of inquiry that was before the district court and inconsistent with both domestic and international law.[2]

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2. This decision, while adversely impacting upon the ability of the federal courts to determine whether litigants were the victims of torture, will also undermine our national interest in maintaining our role as the world leader in recognizing and protecting human rights. Historically, the United States has always been recognized as the world's leader in protecting human rights. The Declaration of Independence, was not merely an announcement of our nation's revolution against Great Britain. It was the announcement of a revolutionary principle in the history of mankind. "We hold these truths to be self- evident, that all men are created equal, that they are endowed with certain unalienable Rights, that among these are life, liberty, and the pursuit of happiness." Though self evident to our founding fathers, these principles were new to the world. Up until that declaration, no government had ever held that its citizens were entitled to such rights.

But the Declaration of Independence was no mere statement of idealistic principle. It was the foundation upon which our nation first recognized and then fought to protect other fundamental human rights. For instance, the Fifth Amendment to the Constitution of the United States limited the power of the federal government to deprive anyone of "life, liberty, or property" without due process of law, a principle so important that it was extended to the states in the Fourteenth Amendment. The principle that no man could be enslaved, embodied within the Thirteenth Amendment, was established not merely through the enactment of this amendment, but as a result of the bloodiest conflict in our nation's history.

Our recognition of human rights has been broad in scope, encompassing the right to worship as one chooses, the First Amendment, and the right of women to vote, the Nineteenth Amendment. The right of people everywhere to be free from genocide and torture has been guaranteed only as a result of

(Cont'd)

If victims of official torture are to stand any chance of establishing their claims in thecourts of the United States, our courts must not erect unwarranted obstacles in their way through the adoption of onerous standards of proof or erroneous definitions for torture. The obstacles to raising such claims are great enough without additional burdens placed upon petitioners by the courts. Persons alleging torture by government agents will always be at a disadvantage in raising such claims. They will often be accused of crimes themselves. There will be no witnesses to the acts of torture other than their tormentors. And the objects of accusation, government agents, will come to court with an aura of credibility, difficult to impeach.

Under these circumstances, the appropriate quantum of proof for determinations such as the one at bar is preponderance of the evidence. This is the standard which courts are most familiar with and which is most applicable to inquiries of a similar nature. *Colorado v. Connelly*, 479 U.S. 157, 167-169 (1986) (waiver or rights); *Nix v. Williams*, 467 U.S. 431, 444, n. 5 (1984) (inevitable discovery); *United States v. Matlock*, 415 U.S. 164 (1974) (voluntariness of consent). A "strong showing" standard is more suited to issues of discretion or judgment, not preliminary questions of fact. *See, e.g., Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (strong showing of likely success on the merits required for issuance of a stay under Fed. Rule Civ. Proc.

(Cont'd)

leadership of the United States in the international arena. The Nurenburg trials in 1946 occurred only because the United States insisted that those who committed atrocities had to be punished in accordance with recognized concepts of due process. The Yugoslav war crimes tribunal was able to go forward with its work only because the United States in the Dayton Accords insisted that there could be no amnesty for war crimes. Plainly both the Universal Declaration of Human Rights and The European Convention on Human Rights, discussed above, could not have been written outside of the context of our national experience.

62(c); *United States v. John Doe, Inc.*, 481 U.S. 102, 112 (1987) (strong showing of particularized need required to permit disclosure of grand jury material to private parties under Fed. Rule Crim. Proc. 6(e)).

The District Court, having applied an incorrect test for determining whether Petitioner had been subjected to the acts alleged, came to an incorrect factual finding, which the Ninth Circuit found was not clearly erroneous. But the Ninth Circuit also saidthat had it been the finder of fact, its findings of fact would have been different. Under these circumstances, and given the importance of the legal issue to be resolved, this Court should accept certiorari in order to determine the appropriate quantum of evidence required to prove the commission of acts of torture.

The District Court also found that even if the acts as alleged by Petitioner were true, they did not constitute such "grossly cruel and unusual barbarities," as to require dismissal of the indictment. The Ninth Circuit agreed. According to the Ninth Circuit, Petitioner's treatment at the hands of his captors, the US Marshals, was not of the "most shocking and outrageous kind" as to mandate exercise of the court's supervisory powers. Nevertheless, despite this holding, the Ninth Circuit also observed that "the evidence reasonably could support a finding that he was tortured" and that if the court had been the trier of fact, it would have weighed the evidence differently.

Such an analysis creates great uncertainty in the law. Under one reading of the court's opinion, the Ninth Circuit seems to be saying that acts of torture are sufficient to shock the conscience of the court but that Petitioner had failed to make an adequate showing that these acts occurred. Under another reading of the opinion, the court seems to be saying that mere acts of torture are not sufficient, that there exist some sort of hierarchy of torture which separates the mundane from the truly

barbaric, and that Petitioner provided sufficient evidence of the former but not the latter.[3]

This uncertainty is both dangerous and unwarranted. Although the Ninth Circuit failed to articulate a definition for torture, such a definition can be found in the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly RES 39/46, Annex. Part I, Article 1, Paragraph 1, defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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3. The phrase "cruel and unusual barbarities" appears to have its origin in the Eighth Amendment's prohibition of cruel and unusual punishment. But unlike the language of the Eighth Amendment, "cruel and unusual barbarities" is an oxymoron. Because punishment can either be humane or cruel, a prohibition on cruel punishment is a rational expression of a civilized society. But one cannot conceive of a barbarity which is not both cruel and unusual. Thus the test adopted by the Ninth Circuit tells us nothing about the conduct sought to be outlawed.

Opened for signature Feb. 4, 1985, entered into force, Mar. 4, 1985. Equally availing is the definition found in 18 U.S.C. § 2340:

> (1) " torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from — (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-alteringsubstances or other procedures calculated to disrupt profoundly the senses or personality.

There is no reason to believe that the exercise of a court's supervisory powers depends upon a showing of some greater barbarity than that proscribed by these provisions. Had the District Court or the Ninth Circuit followed either definition, the courts would have had no difficulty recognizing that the

conduct alleged by Petitioner was indeed torture. The only issue then would have been whether the conduct alleged actually occurred.

At no time did either the District Court or the Ninth Circuit make a credibility finding against Petitioner. The issues that this Court must decide, therefore, is what quantum of evidence must be presented to satisfy a petitioner's burden and what acts by government agents constitute torture. The failure to decide these issues will make it more likely that acts of official torture will go unpunished and undeterred. It will also demonstrate to the world that in "hard cases" our courts are prepared to ignore the most fundamental protections of international law. Such decisions invariably undermine respect for the rule of law and ultimately come back to haunt us.

II.

THE DECISION OF THE NINTH CIRCUIT HOLDING THAT AN INDICTMENT CANNOT BE DISMISSED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *ROCHIN V. CALIFORNIA*,[4] THE DECISION OF THE SECOND CIRCUIT IN *UNITED STATES EX REL. LUJAN V. GENGLER*,[5] AND THE DECISION OF THE DISTRICT COURT IN *UNITED STATES V. MANUEL ANTONIO NORIEGA*.[6]

The Ninth Circuit held that while it had the authority to dismiss an indictment under its supervisory powers, it did not

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4. 342 U.S. 165 (1952).

5. 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

6. 746 F. Supp. 1506 (S.D. Fla. 1990).

have such authority under the Due Process Clause of the Fifth Amendment. In so holding, the Ninth Circuit relied upon the decisions of this Court in which this Court had held that the jurisdiction of a court to try a defendant is not affected by any illegality in the defendant's detention or presence before the court. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *United States v. Crews*, 445 U.S. 463, 474 (1980).

In none of these cases, however, did the defendant claim that he had been tortured by the arresting agents.

In *United States v. Russell*, 411 U.S. 423, 431 (1973), this Court stated:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process would absolutely bar the government from invoking judicial processes to obtain a conviction. . . .

Cf. Rochin v. California, 342 U.S. 165 (1952).

The sort of conduct that would give rise to due process concerns was indicated by the Court's citation to its decision in *Rochin v. California*, 342 U.S. 165 (1952). In that case a suspect who swallowed two tablets as police officers were placing him under arrest, was taken in handcuffs by state police officers to a hospital where a doctor was ordered to force "an emetic solution through a tube into [the defendant's] stomach against his will." When the defendant vomited, the capsules were recovered and subsequently introduced in evidence against him. Holding such evidence inadmissible Justice Frankfurter wrote:

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgement upon the whole course of proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

342 U.S. 169.

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too categorically. This is conduct that shocks the conscience. . . .

342 U.S. 172.

Following these decisions by this Court, the Second Circuit in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) as modified by *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975) has held that an indictment may be dismissed under the Due Process Clause in response to conduct shocking to the conscience. The continuing validity of that principle was recognized by the District Court in *United States v. Manuel Antonio Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (declining to dismiss on grounds that the defendant was not himself harmed by conduct of United States armed forces). To the extent that there is a conflict between the decision of the Ninth Circuit

herein and these decisions, this Court should accept review to resolve this issue. There can be no more important question before our courts than whether our courts have the power under the Due Process Clause to redress acts of official torture.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 8, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-50165

D.C. No. CR-88-0129-WJR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN RAMON MATTA,

Defendant-Appellant.

ORDER

Before: Browning, Poole and Noonan, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Browning and Noonan vote to reject the suggestion for rehearing en banc, and Judge Poole so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix A

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 8, 1996

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50053

D.C. No. CR-85-0606-PAR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN RAMON MATTA-LOPEZ, aka MATTA-BALLESTEROS, aka JUAN RAMON, aka EL NEGRO, aka JUAN RAMON MATTA,

Defendant-Appellant.

ORDER

Before: BROWNING, POOLE and NOONAN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Browning and Noonan vote to reject the suggestion for rehearing en banc, and Judge Poole so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appendix B

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 15, 1996

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-50336

D.C. No. CR-87-00422-ER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN RAMON MATTA-BALLESTEROS,

Defendant-Appellant.

Filed October 15, 1996

Before: James R. Browning, Cecil F. Poole, and John T. Noonan, Jr., Circuit Judges.

ORDER

The majority opinion in this case, published at 71 F.3d 754 is amended as follows:

Page 761, last full paragraph on page:

Appendix C

Replace "Subsequently, he was convicted in the Northern District of Florida for various narcotics charges and escape. These convictions . . ." with "Subsequently, he was convicted in the Northern District of Florida for escape. This conviction . . .".

Page 768, third full paragraph, first sentence:

Delete entire sentence beginning "The audiotapes were obtained . . .".

Second sentence: Delete introductory clause "Under such circumstances," (i.e. begin sentence with "We have held. . .").

The concurring opinion in this case, published at 71 F.3d 754, 772-775, is amended as follows:

Page 772, first sentence of the concurrence:

Replace "for nearly two years" with "since January 4, 1993."

Page 775, first full paragraph, second sentence:

Replace "various drug offenses" with "escape."

With these changes, the panel votes unanimously to deny the petition for rehearing. Judges Browning and Noonan vote to reject the suggestion for rehearing en banc, and Judge Poole would so recommend.

Appendix C

The full court has been advised of the suggestion for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 26, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-50053

D.C. No. CR-85-0606-PAR

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JUAN RAMON MATTA-LOPEZ, AKA MATTA-BALLESTEROS, AKA JUAN RAMON, AKA EL NEGRO, AKA JUAN RAMON MATTA,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Pamela Ann Rymer, District Judge, Presiding

Argued and Submitted January 5, 1993
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix D

Before: BROWNING, POOLE and NOONAN, Circuit Judges.

Juan Ramon Matta appeals his conviction and sentence, following a jury trial, for one count of conducting a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, one count of conspiracy to distribute and to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846, and five substantive counts of distribution and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). We have jurisdiction over this timely appeal under 28 U.S.C. § 1291, and we affirm.

I

In September 1981, agents of the federal Drug Enforcement Administration (DEA) smashed a large cocaine conspiracy operating out of an apartment complex in Van Nuys, California. From January 1981 through September 1981, the organization sold 1,347 kilograms of cocaine for $73,561,832 to 27 midlevel distributors. At trial, the government presented evidence that Matta was the supplier, organizer, and leader of the drug organization. This evidence was presented in two ways: (1) the supplier was "El Negro" aka "Jose Campo" and (2) Matta was El Negro/Jose Campo.

To prove that the supplier was El Negro/Jose Campo, the government introduced ledgers and phone books of the Van Nuys conspirators and telephone toll records showing that indicted coconspirator James Victoria-Cano delivered cocaine to the Van Nuys conspirators, who paid him more than 23 million dollars from June to September 1981. The government also introduced a personal phone book, papers found in one of the Van Nuys apartments (Gov't Exh. 27), and papers found in trash thrown

away by indicted coconspirator Marta Cardona (Gov't Exh. 9B) that contained several phone numbers and the names "El Negro," "Negro Lica," "Negro Cali," and "Negro Jose." The phone numbers were in code, and when decoded, corresponded to numbers listed in the 1981 Cali, Colombia telephone phone book for a business belonging to Matta's wife. Telephone toll records showed fifteen calls from the Van Nuys complex to another number in the personal phone book for "Negro Jose." A courier also testified that she heard Van Nuys conspirators refer to El Negro as the supplier.

The government also presented testimony by Hector Barona, a drug smuggler who entered into the witness protection program. Barona testified that James Acosta, who told him that he worked for Jose Campo/El Negro/Negro Jose, recruited him to import cocaine. Barona testified, and his pilots confirmed, that he imported two shipments of cocaine in May 1981 and July 1981, and, pursuant to Acosta's directions, delivered the cocaine to Dario Zapata-Serna. Telephone toll records show multiple calls from Barona's phone to Zapata-Serna's phone during July 1981. Telephone toll records also show a phone call from the Van Nuys apartment complex to Zapata-Serna's phone. The conspirators' drug ledgers show that the Van Nuys conspirators flew to New York and picked up cocaine from Zapata-Serna.

To establish that Matta was El Negro/Jose Campo, Barona testified, and his pilot confirmed, that he tried to import two shipments of cocaine in October 1981, after the dates covered in the indictment, but the planes crashed. After the first crash, Barona testified that Acosta told him that El Negro/Jose Campo would reimburse him. After the second crash, Acosta told him that Jose Campo wanted to talk to him. Barona testified that

Jose Campo called him and that Barona called him back several times. Telephone toll records showed calls from Barona's phone to an unidentified Bogata, Colombia number during this time period.

In November 1981, Barona traveled to Cali, Colombia to meet with Jose Campo. He followed Acosta's directions to a house on Guadalupe Avenue, which he subsequently identified from a photograph as 5-55 Guadalupe Avenue. This address was listed in the 1981 Cali, Colombia phone book as the address for Matta's wife's business. Barona asked for Jose Campo and was directed to a room, where a man was presiding over a meeting of several persons known to Barona as drug traffickers. The man identified himself as Jose Campo, and Barona recognized his voice from the prior phone calls. Barona identified him at trial as Matta.

The jury convicted Matta of all counts charged in the indictment, and the district court sentenced him to life imprisonment without the possibility of parole on the CCE count, concurrent fifteen-year sentence on the conspiracy count to be imposed only if the CCE conviction were reversed on appeal. This appeal followed.

II

Matta contends that the district court lacked jurisdiction to try him because he was forcibly abducted from Honduras and brought to the United States for trial. In *United States v. Matta-Ballesteros,* No. 91-50036, slip op. 15089 (9th Cir. Dec. 1, 1995), we rejected this contention. Accordingly, we affirm the district court's determination that it had jurisdiction to try Matta.

Appendix D

III

Matta contends on appeal that his speedy trial rights were violated by (1) the delay between January 6, 1986, the date the indictment was unsealed, and April 5, 1988, the date he was brought to the United States, and (2) the delay between April 5, 1988 and May 9, 1989, the date that the was arraigned.

We decline to address the merits of Matta's speedy trial claim because he did not raise the issue sufficiently in the district court. In the district court, he argued only that his speedy trial rights "may have been violated by the delay in prosecution" and "reserve[d] the right to supplement" his motion to dismiss based on the speedy trial claim after discovery. The district court observed that Matta cited no law or facts in support of his motion and denied the motion without prejudice. Matta did not pursue the claim further. Matta's failure to litigate his claim in the district court precludes appellate review. *See United States v. Oregon*, 769 F.2d 1410, 1415 (9th Cir. 1985).

IV

Matta contends that the district court erred by admitting coconspirator statements generally because the government did not prove his connection to the conspiracy by a preponderance of the evidence. He also challenges the admission of specific statements on the grounds that some statements were made after the conspiracy ended and other statements could not be linked to specific coconspirators. We disagree.

Appendix D

A. Admission of Specific Statements

Because the coconspirator statements, although not sufficient proof; may be used to prove Matta's connection to the conspiracy, *see United States v. Silverman,* 861 F.2d 571, 577 (9th Cir. 1988), our initial inquiry is whether Matta's challenges to the admission of specific statements have any merit. Matta essentially challenges the admission of the evidence under Federal Rules of Evidence 402, 403, and 404, and thus, we review for an abuse of discretion. *United States v. Blaylock,* 20 F.3d 1458, 1462 (9th Cir. 1994).

Matta initially contends that the district court erred by admitting evidence regarding two attempted air shipments of cocaine in October 1981 on the ground that the events occurred after September 24, 1981, the end of the period covered by the indictment. The evidence consisted primarily of Barona's testimony regarding the attempted importations and his conversations and meetings with Matta and Acosta. Matta's challenges to the admission of this evidence fail for three reasons.

First, Matta's own statements to Barona are party admissions admissible under Fed. R. Evid. 801(d)(2)(A). *See United States v. Zavala-Serra,* 853 F.2d 1512, 1515 (9th Cir. 1988) (defendant's statements to government witness were party admissions). We have upheld the admission of a party's statements are relevant to the defendant's knowledge of the role in the conspiracy. *See United States v. Harrison-Philpot,* 978 F.2d 1520, 1527 (9th Cir. 1992) (admissions to government agents regarding possible drug sale showed defendant's participation in prior charged conspiracy), *cert. denied,* 113 S. Ct. 2392 (1993); *United States v. Bibo-Rodriguez,* 922 F.2d 1398, 1400-02 (9th Cir.) (admissions made nine weeks after the charged offense showed defendant's

knowledge), *cert. denied,* 111 S. Ct. 2861 (1991). Here, as in *Harrison-Philpot,* the district court gave a limiting instruction that the evidence was relevant only to Matta's role in the conspiracy. *See* 978 F.2d at 1527 & n.7. The district court did not abuse its discretion by admitting testimony regarding Matta's admissions.

Second, most of Barona's direct testimony regarding the post-September activities is not objectionable on coconspirator statement grounds. Instead, Matta really objects to the admissibility of subsequent bad acts evidence under Fed. R. Evid. 404(b) on the ground that the testimony's probative value is substantially outweighed by the danger of unfair prejudice. *See Bibo-Rodriguez,* 922 F.2d at 1400-01. Matta argues that unfair prejudice is demonstrated because Barona's testimony is "unbelievable" and inconsistent and the government "offered no assurance of Barona's credibility."[1]

The question of Barona's credibility was for the trier of fact, however, "not for appellate court reviewing his testimony on the basis of a cold record." *Zavala-Serra,* 853 F.2d at 1515. Moreover, Barona's pilots, the drug ledgers, and telephone toll records corroborated his testimony regarding the actual and attempted importations and delivery to the Van Nuys conspirators via Zapta-Serna. Telephone toll records also show calls from Barona's phone to an unidentified Bogata number after the planes crashed, which corroborates his story that he called Matta. Thus, as in *Zavala-Serra,* Barona's corroborated testimony was not inherently incredible. *See* 853 F.2d at 1515. Barona's exchange of his testimony for protection in the witness

1. The government suggests that Matta did not raise the Rule 404(b) issue on appeal, but we reach this issue because Matta discusses it specifically in both his opening and reply briefs.

protection program does not render his testimony inherently unbelievable. Furthermore, the district court's limiting instruction assuages Rule 403 concerns. *See Harrison-Philpot*, 978 F.2d at 1527. In sum, the district court did not abuse its discretion by admitting the other acts evidence as relevant to Matta's role in the conspiracy.

Third, to the extent Matta even raises the issue, admission of Barona's testimony regarding unindicted coconspirator Acosta's post-September 1981 statements is harmless because Acosta's statements duplicate other evidence. *See United States v. Garza*, 980 F.2d 546, 553 (9th Cir. 1992).

Matta also asserts that the district court erred by admitting two documents, Government Exhibits 27 and 9B, as coconspirator statements because handwriting analysis could not link them to any coconspirator. These documents, which were found in the Van Nuys apartments and in trash thrown out by a coconspirator, contained phone numbers registered to Matta's wife's business and the names "El Negro," "Negro Lica," and "Negro Cali." The district court admitted the evidence only to show an "association, if any, between the person or place where found and the person or place noted."

"A hearsay declaration may be admissible if it is offered, not for the truth of the matter asserted, but to prove that the persons involved in the communications were coconspirators." *United States v. Sanchez-Lopez*, 879 F.2d 541, 554 (9th Cir. 1989) (citing with approval *United States v. Mazyak*, 650 F.2d 788, 792 (5th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982), where "a letter addressed to individuals charged with a conspiracy which was found on a vessel containing contraband was not admitted for its truth, but was relevant evidence admitted

for the limited purpose of linking the individuals to the vessel and to each other"); *see also United States v. Huguez-Ibarra,* 954 F.2d 546, 552-53 (9th Cir. 1992) (admitted (1) drug transaction notepads not linked to specific coconspirators to show that the type of activities charged in the indictment were being carried out in the residence, not to prove what was written in the pads, and (2) car receipt in name similar to defendant's name showing cash payment of $4000). The evidence may be admitted if there is a sufficient showing of relevance and authenticity and if its probative value is not substantially outweighed by any undue prejudice. Fed. R. Evid. 403; *Huguez-Ibarra,* 954 F.2d at 553.

Here, the documents, like the letter in *Mazyak,* were admitted to show association. *See Sanchez-Lopez,* 879 F.2d at 554 (citing *Mazyak,* 650 F.2d at 792). The documents were relevant, and they were found either in an apartment that was used only for drugs or in trash that was thrown away by a coconspirator. *See Huguez-Ibarra,* 954 F.2d at 552-553. Moreover, the district court gave a limiting instruction that minimized the risk of undue prejudice. Accordingly, the district court did not abuse its discretion by admitting the evidence. In any event, the notations in the documents duplicated other evidence that was properly admitted, and thus any error is harmless. *See Garza,* 980 F.2d at 553.

B. Admissibility Generally

Because Matta's challenges to the district court's admission of specific statements fail, we now examine whether the government proved Matta's connection to the conspiracy by a preponderance of the evidence such that coconspirator statements generally should have been admitted. *See Silverman,* 861 F.2d at 577-78.

Appendix D

As a factual predicate for the admissibility of the statements, the government must prove the existence of a conspiracy and the defendant's connection to it by a preponderance of the evidence. *Bourjaily v. United States,* 483 U.S. 171, 181 91987); *Silverman,* 861 F.2d at 577.[2] The coconspirator's statements may be used to prove these preliminary facts, *Bourjaily,* 483 U.S. at 181, but because coconspirator statements are presumptively unreliable, this court requires evidence of the conspiracy and the defendant's connection to it that is independent of the coconspirator statements. *Silverman,* 861 F.2d at 577-78. A "slight" connection to the conspiracy is sufficient for admission of coconspirator statements. *United States v. Pinkey,* 15 F.3d 825, 827 (9th Cir. 1994); *quoting United States v. Foster,* 985 F.2d 466, 469 (9th Cir. 1993); *United States v. Penagos,* 823 F.2d 346, 348 (9th Cir. 1987).

Barona testified that he imported cocaine from Matta and delivered the cocaine to Dario Zapata-Serna. His pilots corroborated his testimony regarding flights from Colombia to the United States during the conspiracy and during October 1981. Documents found in the apartment and in trash thrown away by

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2. Our standard of review regarding the district court's determination of this factual predicte is unclear. *United States v. Pena-Espinoz,* 47 F.3d 356, 361 n.3 (9th Cir. 1995) (standard "unsettled"). In *Bourjaily,* the Supreme Court noted that the district court's factfinding regarding the existence of a conspiracy was not clearly erroneous. 483 U.S. at 181. On the other hand, this Court has reviewed "de novo the legal question of whether the government established a prima facie showing of conspiracy but apply a clearly erroneous standard in reviewing whether a challenged statement was made in the course and furtherance of the conspiracy." *Pena-Espinoza,* 47 F.3d at 360-361, *quoting United States v. Arias-Villanueva,* 998 F.2d 1491, 1502 (9th Cir.) (citation omitted), *cert. denied,* 114 S. Ct. 573 (1993). We do not err under either standard.

a coconspirator were admitted for association and showed a connection between the Van Nuys drug operation and Matta. Other evidence showed an association between the Van Nuys coconspirators and Zapata-Serna. Independent evidence establishes at least a "slight" connection to the conspiracy, and the district court did not err by finding that by introducing this evidence and the coconspirator statements, the government demonstrated Matta's connection to the conspiracy by a preponderance of the evidence. *See Silverman,* 861 F.2d at 577-78; *Penagos,* 823 F.2d at 348.

V

Matta contends that the district court erred by admitting into evidence a 1981 Cali, Colombia phone directory and a Venezualan passport. We review for an abuse of discretion. *United States v. Yin,* 935 F.2d 990, 994 (9th Cir. 1991).

The government introduced the 1981 Cali phone directory, which listed numbers found in the coconspirators' papers as the business number of Matta's wife and which listed 5-55 Guadalupe Avenue, the location of Barona's meeting with Matta, as her business address. Admission of the phone directory was proper under Fed. R. Evid. 803(17). *See United States v. Anderson,* 532 F.2d 1218, 1225 (9th Cir.), *cert. denied,* 429 U.S. 839 (1976). Moreover, government witnesses testified that the book was reliable, and accordingly, Matta's argument fails.

The government also introduced into evidence a Venezualan passport seized from Matta that was issued in 1981 and that contained Matta's photograph and a false name. During closing argument, the government argued that Matta's possession of the false passport tended to show he was not "merely a legitimate,

honest cattle rancher." The district court did not abuse its discretion by admitting the passport. *See United States v. Guerrero*, 756 F.2d 1342, 1347 (9th Cir.) (false identification shows consciousness of guilt), *cert. denied*, 469 U.S. 934 (1984); *United States v. Birges*, 723 F.2d 666, 672 (9th Cir.) (same), *cert. denied*, 469 U.S. 943 (1984). Moreover, the admission of the passport did not affect Matta's substantial rights, and thus any error is harmless. *See Garza*, 980 F.2d at 553.

VI

Matta contends that his motions for a judgment of acquittal and a new trial should have been granted because there was insufficient evidence to prove his connection to the conspiracy beyond a reasonable doubt, the jury was improperly instructed that a conviction on the conspiracy count could support convictions on the underlying substantive counts, the jury was unduly inflamed by prejudicial publicity, and new evidence established that another drug trafficker was El Negro. We disagree.

First, sufficient evidence supports Matta's conviction for conspiracy. After the government establishes the existence of a conspiracy, it "need only prove a 'slight' connection between the defendant and the conspiracy." *United States v. Foster*, 57 F.3d 727, 729 (9th Cir. 1995). Matta concedes the existence of a conspiracy, and the government established his connection to the conspiracy through Barona, who identified him as the supplier of the drug ring. Matta's contention that Barona's testimony was not credible fails. Barona's credibility was for the jury to weigh, not this court. *See United States v. Endicott*, 803 F.2d 506, 515 (9th Cir. 1986); *see also United States v. Lai*, 944 F.2d 1434, 1440 (9th Cir. 1991) ("[e]ven the uncorroborated

testimony of an accomplice is enough to sustain a conviction unless it is incredible or insubstantial on its face"), *cert. denied,* 112 S. Ct. 947 (1992). Moreover, other evidence corroborated Barona's testimony, including testimony from his pilots regarding the actual and attempted importations, documentary evidence and a courier's testimony that Matta/El Negro/Jose Campo was the supplier, and other evidence showing a connection between the Van Nuys conspirators and Zapata-Serna, the intermediary who received the cocaine from Matta via Barona. In sum, drawing all inferences in favor of the government, a rational jury could conclude beyond a reasonable doubt that Matta was the supplier of the drug conspiracy. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Second, the district court did not err by instructing the jury that if they convicted Matta of conspiracy, they could convict him of the underlying substantive offenses. *See Pinkerton v. United States,* 328 U.S. 640, 646-47 (1946).

Third, the pretrial publicity was not so pervasive that prejudice can be presumed. *See United States v. Rewald,* 889 F.2d 836, 864 (9th Cir. 1989), *amended on other grounds,* 902 F.2d 18 (9th Cir.), *cert. denied,* 498 U.S. 819 (1990). Some jurors knew about the publicity and some did not, but all asserted that they could be fair and impartial. The trial court's findings that the jurors were not biased were not manifestly erroneous. *See Patton v. Yount,* 467 U.S. 1025, 1031 (1984).

Fourth, an article regarding the arrest of another drug trafficker known as El Negro did not warrant a new trial. Although the article arguably was relevant, Matta presented evidence that El Negro was a common nickname. Moreover, other evidence linked him to the Van Nuys conspirators. Thus, the

article was cumulative and not likely to result in an acquittal, and the district court did not abuse its discretion by denying Matta's motion for a new trial. *See United States v. Davis*, 960 F.2d 820, 824-825 (9th Cir.), *cert. denied*, 113 S. Ct. 210 (1992).

Matta argues that his rights under the Confrontation Clause of the sixth amendment were violated when the district court did not allow him to cross-examine Barona about "an incident where Barona allegedly put a pistol in a pilot's mouth" and about Barona's relationship with Manuel Noriega in order to show Barona's reprehensible character. The district court did not abuse its discretion in limiting the cross-examination because the testimony that Matta sought to elicit was not probative of truthfulness. *See* Fed. R. Evid. 608(b); *United States v. Whitworth*, 856 F.2d 1268, 1284 (9th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989). Moreover, Matta cross-examined Barona over a period of four days. The district court's minor restrictions on cross-examination did not limit the jurors' ability to "appropriately draw inferences relating to [Barona's] . . . reliability," and thus Matta's Confrontation Clause rights were not violated. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678, 680 (1986): *United States v. Torres*, 937 F.2d 1469, 1473 (9th Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992).

VIII

Matta contends for the first time on appeal that the prosecutor denied him a fair trial by vouching for documentary evidence and a government witness. The prosecutor's statements were not plain error. *See United States v. Laurins*, 857 F.2d 529, 539 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

First, although the prosecutor arguably suggested in closing that telephone toll records established that coconspirators called each other, the district court cured any error by interrupting the prosecutor and reinstructing the jury that the toll records showed only that calls were made from one number to another and did not show that two people spoke to each other. *See Endicott,* 803 F.2d at 513.

Second, the prosecutor's closing argument that notations in the drug ledgers "do not lie" is not prosecutorial misconduct rendering Matta's trial fundamentally unfair. *See United States v. Yarbrough,* 852 F.2d 1522, 1539 (9th Cir.), *cert. denied,* 488 U.S. 866 (1988).

Third, although the prosecutor speculated that Barona's story would have fallen apart on cross-examination if he had fabricated it, in context the remarks were not vouching. In any event, any error was not plain error rendering Matta's trial fundamentally unfair. *See id.* at 1539. Similarly, the prosecutor's statement that the government "risked" plea bargains to get "somebody higher up" was in response to Matta's criticism of Barona's plea and was not plain error. *See id.*

IX

Matta contends that the district court erred by sentencing him on the CCE count (Count VII) and on the underlying substantive offenses in Counts II through VI, which he argues should be dismissed as "lesser included offenses." This argument fails.

Although a district court may not sentence a defendant on both a CCE count and a predicate conspiracy count, *United*

States v. Medina, 940 F.2d 1247, 1253 (9th Cir. 1991), it may sentence a defendant for both a CCE offense and any underlying substantive offenses. *Garrett v. United States*, 471 U.S. 773, 779 (1985); *United States v. Burt*, 765 F.2d 1364, 1368-69 (9th Cir. 1985). The district court followed this rule when it sentenced Matta to life without parole on the CCE count, concurrent fifteen-year sentences on the substantive offenses, and an alternative concurrent fifteen-year sentence on the conspiracy count (Count I), effective only in the CCE conviction is reversed on appeal. *See Medina*, 940 F.2d at 1253 (court should sentence in the alternative on the predicate conspiracy count in case of appellate reversal of the CCE count); *Burt*, 765 F.2d at 1368-69.

AFFIRMED.

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 15, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-50165

D.C. No. CR-88-0129-WJR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN RAMON MATTA-BALLESTEROS,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted January 4, 1993
San Francisco, California
Submission vacated April 7, 1994
Resubmitted June 6, 1994

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix E

Before: BROWNING, POOLE, and NOONAN, Circuit Judges.

Juan Ramon Matta-Ballesteros (Matta) appeals eleven felony cocaine-trafficking convictions. Matta was convicted of conspiring to import cocaine (21 U.S.C. § 963), conspiring to distribute cocaine (21 U.S.C. § 846), eight counts of aiding and abetting the distribution, or attempted distribution, of cocaine (21 U.S.C. §§ 841(a)(1) & 846; 18 U.S.C. 2) and engaging in a continuing criminal enterprise (21 U.S.C. § 848). We have jurisdiction under 28 U.S.C. § 1291; we affirm in part and vacate in part.[1]

I

On February 25, 1988, the United States indicted Matta and five co-defendants for participating in an international cocaine trafficking conspiracy.[2] The indictment charged that between 1983 and 1985, Matta was the leader and organizer of a cocaine ring that had smuggled massive quantities of cocaine from South America to Mexico, and from there into Arizona, Southern California, and New York.

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1. Alleging that he was kidnapped in Honduras by United States officials and tortured en route here, Matta also challenges the United States' jurisdiction to prosecute him. We considered and rejected the identical argument in *United States v. Matta-Ballesteros*, No. 91-50336, slip op. 15089, 15097-15103 (9th Cir. Dec. 1, 1995) decided contemporaneously with this appeal.

Matta also sought to file a supplemental brief at oral argument raising new arguments in favor of reversal. We decline to review these additional arguments.

2. None of Matta's five co-defendants were apprehended. Matta was the sole defendant to stand trial.

Appendix E

A key witness in the case was John Drummond, whom the government alleged ran Matta's Arizona operations. Other witnesses testified about Matta's Southern California cocaine operations.

In addition to this testimony, two officers of the Spanish National Police, Agents Martinez and Gormaz, testified about telephone wiretaps that had been made of Matta's home and office in Spain.

The jury found Matta guilty on eleven of twelve counts. The judge sentenced Matta to life imprisonment on the continuing criminal enterprise count, and to fifteen years for each of the other ten counts. The fifteen year sentences were to run consecutively to each other, for a total of 150 years, but concurrently with the life sentence. Matta filed a timely notice of appeal.

II

A. *Speedy Trial Issues*

Matta argues that delays in his trial violated his Constitutional and statutory speedy trial rights, and deprived him of effective assistance of counsel. We review these issues de novo. *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1049-50 (9th Cir. 1990) (speedy trial); *United States v. Swanson*, 943 F.2d 1070, 1072 (9th Cir. 1991) (ineffective assistance of counsel).

Matta was arraigned on May 4, 1989. After a number of continuances, Matta's trial date was set for April 24, 1990. Matta, who either requested or agreed to each of these continuances,

does not complain of pretrial delay during this period. Rather, he objects to a three-month delay that occurred when his April 24 trial date was postponed for an intervening trial before Judge Rafeedie. That trial concerned Matta's alleged complicity in the kidnapping and murder of DEA agent Enrique Camarena.

1. *The Speedy Trial Act*

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, requires criminal trials to "commence within seventy days from the filing date . . . of the information or indictment, or from the date the defendant has appeared before a judicial officer," whichever is later.[3] 18 U.S.C. § 3161(c)(1). If the trial does not begin within seventy days, the information or indictment will be dismissed on defendant's motion. *Id.* § 3162(a)(2). However, "[f]ailure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section." *Id.; see United States v. Brown*, 761 F.2d 1272, 1277 (9th Cir. 1985).

The government contends Matta has waived his Speedy Trial Act claim. We need not address this contention, because we conclude Matta's Speedy Trial Act claim fails on the merits.

Matta's theory that the Camarena trial caused excessive delay is directly refuted by the text of the Act. The Act expressly *excludes* from computation "[a]ny period of delay resulting from other proceedings concerning the defendant, including . . . delay resulting from trial with respect to other charges against the defendant." 18 U.S.C. § 3161(h)(1)(D). The Ninth Circuit has

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3. Here, Matta's May 4, 1989 arraignment is the relevant date. His indictment was filed over a year earlier, on February 25, 1988.

several times denied speedy trial challenges on this basis. *E.g., United States v. Lopez-Espindola*, 632 F.2d 107, 109 (9th Cir. 1980); *United States v. Allsup*, 573 F.2d 1141, 1144 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978).[4]

Matta tries to get around this Speedy Trial Act exception by arguing that the delay for the Camarena trial was not the "result" of other charges against him, but was instead the "result" of Judge Rafeedie's refusal to sever him from the Camarena trial. This argument is meritless. Judge Rafeedie did not "cause" the delay; the Camarena trial caused the delay. Judge Rafeedie simply refused to sever Matta from the trial.

But Matta argues that Judge Rafeedie was *required* to grant a severance, because the Speedy Trial Act excludes only unavoidable intervening proceedings. We reject this argument. Most proceedings which toll the speedy trial period could be postponed or continued. That does not mean that the presiding judge in each case *must* continue the proceeding or else become a superseding cause of the delay. Such a reading would drastically narrow, if not entirely eliminate, the proceedings which toll speedy trial periods under the Act. The Speedy Trial Act was no bar to Matta's prosecution.

2. *Constitutional Claims*

Matta also argues that the Camarena trial violated his constitutional speedy trial rights, and deprived him of effective assistance of counsel. Neither claim has merit.

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4. Matta's reliance on *United States v. Nance*, 666 F.2d 353 (9th Cir.), *cert. denied*, 456 U.S. 918 (1982); *United States v. Brainer*, 691 F.2d 691 (4th Cir. 1982); and *United States v. Hodges*, 408 F.2d 543 (8th Cir. 1969) are of no help to his claim. They did not concern delays, like the one here, resulting from other trials against the defendant.

Appendix E

A balancing of four factors governs whether a constitutional violation has occurred: (1) the length of the delay; (2) the reason for the delay; (3) prejudice to the defendant; and (4) the defendant's assertion of his speedy trial right. *Dogget v. United States*, 505 U.S. 647, 651 (1992).

Here, the balancing comes out decidedly in the government's favor. First, and perhaps most significantly, Matta complains of only a three-month delay, the length of the Camarena trial. Much longer delays have been upheld by this court and by the Supreme Court. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 533-36 (1972) (five-year delay); *Creekmore v. District Court*, 745 F.2d 1236, 1238 (9th Cir. 1984) (11-month delay).

Second, the reason for the delay was legitimate and in good faith: Matta was on trial elsewhere.

Third, Matta does not demonstrate prejudice due to the delay. He complains that he was "required to prepare for two protracted cases simultaneously," and that he was forced to start the trial in this case "with only a few weeks re-preparation between the two cases." But those are not speedy trial problems. They are just the opposite: problems arising because the second trial started *too soon*. Matta's real complaint, in other words, is that the delay for the Camarena trial was *not long enough*, forcing him to try two large criminal cases back-to-back. Whatever hardship that may have caused Matta cannot be attributed to excessive delay. The delay did not prejudice Matta in the sense relevant to speedy trial challenges.

The last of the four speedy trial factors is whether Matta objected to the delay. Matta did object to the delay. But again, these were really objections that the trial started too soon, not

too late. And in any event, the presence of objections does not outweigh the three other factors. A delay that lasts only three months, arises for a legitimate reason, and does not prejudice the defendant (in the relevant sense), does not violate a defendant's constitutional speedy trial rights.

Matta's ineffective assistance of counsel claim is also meritless. To begin with, "ineffective assistance claims are ordinarily reviewed only in collateral proceedings because such claims usually cannot be resolved without the development of facts outside the original record." *United States v. Sitton*, 968 F.2d 947, 960 (9th Cir.), *cert. denied*, 113 S. Ct. 478 (1992), *and cert. denied*, 113 S. Ct. 1306 (1993).

In any event, Matta does not cite a single error of counsel as a result of the delay, a failure which is fatal to his claim. *See Strickland v. Washington*, 466 U.S. 668, 687, 690 (1984).

B. *The Spanish Wiretaps*

Matta objects to the use of written summaries in place of original tape recordings made from wiretaps of his telephone. Spanish law enforcement officers made the summaries before the original recordings were destroyed. The officers were allowed to read from the summaries at trial.

Matta asserts two kinds of challenges to the summaries: (1) that the wiretaps underlying the summaries were illegal; and (2) that even if the wiretaps were legal, the summaries themselves were inadmissible under the rules of evidence and under the Confrontation Clause.[5]

5. The government argues that Matta, who did not object to the wiretap (Cont'd)

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We review the district court's findings of historical facts for clear error, *United States v. Booker*, 952 F.2d 247, 249 (9th Cir. 1991), its legal rulings de novo, *id.*, and its evidentiary rulings for an abuse of discretion, *United States v. Adrian*, 978 F.2d 486, 492 (9th Cir. 1992).

1. *Legality of the Wiretaps*

Matta argues that the Spanish wiretaps were illegal, making the summaries unusable "fruits." But Matta does not establish an exclusionary principle applicable to the recordings. He complains of his inability to verify whether permission for the wiretaps was properly obtained under Spanish law. But even if he could show that the wiretaps were illegal in Spain — a doubtful proposition in light of testimony that Spanish law was followed — Matta is far from specific about why such a showing would entitle him to exclusion. He appears to rest his contention on Fourth Amendment exclusionary principles. That reliance, however, is misplaced. The Fourth Amendment's exclusionary rule is inapplicable to searches in foreign countries. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

Alternatively, Matta argues that the wiretaps were illegal under American law, violating Title III of the Omnibus Crime Control Act at 1968, 18 U.S.C. §§ 2510-20. But this argument fails also, because, as Matta himself acknowledges, the Ninth Circuit has squarely held that "Title III has no extraterritorial force." *United States v. Peterson*, 812 F.2d 486, 492 (9th Cir. 1987).

(Cont'd)

evidence before trial, has waived his objections to it. *See* Fed. R. Crim. P. 12(b)(3), 12(f). But the district court entertained Matta's untimely suppression motion at trial, abrogating Matta's initial waiver of the objection. *See United States v. Booker*, 952 F.2d 247, 249 (9th Cir. 1991).

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2. *Admissibility of the Summaries*

Alternatively, Matta argues that the wiretap summaries should have been excluded on evidentiary and Confrontation Clause grounds. But as explained below, the summaries were (1) admissible as the best evidence of the destroyed tapes, (2) excepted from the hearsay rule as "past recollections recorded," and (3) not in violation of the Confrontation Clause.

a. *Best Evidence Issues*

Matta argues that it is unfair to allow written notations to substitute for two years of actual recordings. He argues that without access to the audio tapes themselves, he could not challenge the audibility of the recordings or the accuracy of the agents' identification of his voice.

The best evidence rule addresses just such situations. It provides that the original of a tape recording normally is required. Fed. R. Evid. 1002. However, "[t]he original is not required, and other evidence of the contents of a . . . recording . . . is admissible if — (1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Fed. R. Evid. 1004(1).

Secondary evidence used in place of original evidence need meet no threshold standard of quality or reliability; those questions go to weight, not admissibility. *United States v. Gerhart*, 538 F.2d 807, 809 n.2 (8th Cir. 1976) (cited with approval in *Debose v. United States Dep't of Agric.*, 700 F.2d 1262, 1268 (9th Cir. 1983)).

Moreover, the use of secondary evidence in place of

originals does not violate the Confrontation Clause. *Cf. United States v. Benedict*, 647 F.2d 928, 931-32 (9th Cir.) ("It is the person who observed handled or tested the primary evidence who is the subject of cross-examination, not the evidence itself .... 'The fact that the sample is missing may make cross-examination more difficult, but that does not amount to a denial of confrontation' ") (quoting *United States v. Sewar*, 468 F.2d 236, 238 (9th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973)), *cert. denied*, 454 U.S. 1087 (1981).

Here, the government presented evidence that the original wiretap recordings were not destroyed in bad faith, but were summarized and then erased in accordance with standard Spanish National Police procedure. The Spanish officials testified at length about their procedure for listening to the tapes and transcribing or summarizing them. Matta, who extensively cross-examined the officials, makes no plausible argument why it was an abuse of the district court's discretion to accept the officials' testimony. Consequently, we affirm the district court's ruling that Rule 1004(1) allowed the summaries to substitute for the original recording.

b. *The Hearsay Exception*

The fact that the summaries properly survived a best evidence challenge does not mean they are immune from hearsay problems. Indeed, as out-of-court statements offered to prove the truth of the matters asserted, the summaries are classic hearsay. They required an appropriate exception or they will be excluded, notwithstanding their escape from best evidence difficulties.

The relevant exception is contained in Rule 803(5), for past

recollections recorded. A document is admissible as a past recorded recollection if "(1) the witness once had knowledge about the matters in the document, (2) the witness now has insufficient recollection to testify fully and accurately, and (3) the record was made at a time when the matter was fresh in the witness' memory and reflected the witness' knowledge correctly." *United States v. Patterson*, 678 F.2d 774, 778 (9th Cir.) (citations and footnote omitted), *cert. denied*, 459 U.S. 911 (1982).

Matta challenges only the first of these elements. He argues that the agents did not have "knowledge" of the matters in the tapes. According to Matta, "the witnesses had no personal knowledge of the matter of the conversations at issue. They never listened to the actual conversations. They listened only to the tape recordings."

This objection misses the mark. For purposes of Rule 803(5), the agents need not have "knowledge" (*i.e.*, firsthand perception) of the original conversations; that would require them to have been in the room with Matta. What they must have firsthand experience of is whatever it was they summarized — here, the wiretap recordings. This they concededly had.[6] The "knowledge" Matta refers to is actually the inference that what was *on* the recordings was Matta's voice. That inference, however, is a question for trial, not a prerequisite of Rule 803(5). All Rule 803 requires the agents to have "known" was what sounds appeared on the original recordings. What the sounds meant is a separate question.

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6. Matta admits that "[i]f [the agents] knew anything it was about what was on the original recordings."

Matta is also mistaken that the introduction of the recorded recollections violated the Sixth Amendment's Confrontation Clause. *See United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976) (past recollections recorded not violative of the Confrontation Clause).

There were thus neither best evidence problems, nor hearsay problems, nor Confrontation Clause problems with the agents' recitation from their wiretap summaries. Accordingly, we affirm the district court on this issue.

C. *Drug Agent Opinion Testimony*

Matta argues that law enforcement witnesses should not have been allowed to testify that Matta's use of terms such as "cows" and "trucks" in recorded conversations actually referred to cocaine, airplanes, and so on. He argues that this testimony exceeded the scope Federal Rule of Evidence 702, governing expert witness testimony, and was also unfairly prejudicial under Rule 403.

A decision to admit expert testimony is reviewed for an abuse of discretion, and will not be disturbed unless "manifestly erroneous." *United States v. Espinosa*, 827 F.2d 604, 611 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988). Further, admission of such evidence, even if erroneous, will not be disturbed if the error is harmless. *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1397-98 (9th Cir. 1990).

The court did not abuse its discretion by admitting this evidence. Under Rule 702, expert testimony is admissible on specialized topics if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Suitable expert

testimony under the rule includes testimony about the "methods and techniques," or "modus operandi," of narcotics traffickers. *Espinosa,* 827 F.2d at 612.

Here, the expert agents testified that "truck" or "big car" meant airplane; that "beer" referred to fuel; that "technician" meant either a chemist or a pilot; and that "pesos" and "cows" and "toys for Christmas" referred to cocaine. It was not error for the district court to conclude the jury would be aided by this testimony.

Nor was the expert testimony unfairly prejudicial. Judge Rea qualified the testimony with a jury instruction admonishing the jury to give the testimony "the weight, if any, to which you deem it entitled." Moreover, Matta's attorney extensively cross-examined the agents about their testimony, and there was other evidence — such as John Drummond's testimony and the testimony of other involved conspirators — on which the jury could have relied to conclude that Matta was involved in drug trafficking. Under these circumstances, even if the district court abused its discretion by finding the testimony not unfairly prejudicial, any such error would be harmless.

Accordingly, the district court's admission of this testimony was not reversible error.

D. *The "Drug Kingpin" Testimony*

Matta next argues that this identification as the "kingpin" of the drug conspiracy was based on hearsay. Charles Lager, one of John Drummond's confederates, testified that Drummond told him "Don Jose" was the "head kingpin's name," and that Don Jose "lives in Spain." Matta argues that the district court

erroneously admitted this statement under the co-conspirator exception to the hearsay rule. *See* Fed. R. Evid. 801 (d) (2) (E).

A trial court's decision to admit evidence of a co-conspirator's statement is normally reviewed for abuse of discretion and harmless error. *United States v. Garza,* 980 F.2d 546, 553 (9th Cir. 1992). Here, however, Matta must show plain error, because he did not specifically object to the kingpin testimony at trial. *United States v. Traylor,* 656 F.2d 1326, 1333 & n. 6 (9th Cir. 1981).

We need not reach the question whether Drummond's statement was made in furtherance of the conspiracy, as required by Rule 801 (d) (2) (E). This is because there was independent evidence that Matta was known as "Don Jose," and that he supplied the cocaine for the conspiracy John Drummon testified to that effect, as did another witness. Any error from Lager's additional testimony to these facts was not plain error. The kingpin testimony does not warrant reversal of Matta's convictions.

E. *The Toy Photos, Side Band Tapes, and Airplane Manuals*

Matta alleges an anti-defendant bias in some of the court's evidentiary rulings. In particular, he objects to the court's exclusion of photographs depicting Matta delivering Christmas presents to his employees, and to the court's refusal to exclude tapes made of Matta's two-way radio conversations and airplane manuals found at Matta's home. The district court's determinations of relevancy are reviewed for an abuse of discretion. *United States v. Schaff,* 948 F.2d 501, 505-06 (9th Cir. 1991).

Our review of the district court's rulings, however, reveals no abuse of discretion in its decisions to allow the radio transmission and airplane manual evidence. We accept the court's discretionary admission of this evidence.

F. *The Prosecution's Trial Conduct*

Matta alleges a number of instances of prosecutorial misconduct. He claims the government (1) elicited irrelevant evidence linking him to prostitutes; (2) elicited irrelevant evidence linking him to firearms; (3) insinuated that the DEA would not have been investigating him if he were innocent; (4) reminded the jury of stricken testimony during closing arguments; and (5) vouched for the credibility of the government and its witnesses.

The district court's evidentiary ruling and decision to deny a mistrial are reviewed for an abuse of discretion and for harmless error. *Ingram v. Acands, Inc.*, 977 F.2d 1332, 1341 (9th Cir. 1992) (evidentiary rulings); *United States v. Homick*, 964 F.2d 899, 906 (9th Cir. 1992) (mistrial). Prosecutorial misconduct is reviewed for prejudicial error. Such error is present when it is more probable than not that the prosecutor's conduct affected the fairness of the trial. *United States v. McKoy*, 771 F.2d 1207, 1212 (9th Cir. 1985).

None of Matta's allegations amounts to reversible error. While there was mention of prostitutes at trial, the district court limited such testimony to a relevant purpose, namely, showing a relationship between Matta and Drummond. Similarly, the court sustained Matta's objections to evidence of Matta's possession of, or predilection for, firearms, and gave a limiting instruction. The court did not abuse its discretion by denying a mistrial on this basis.

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Matta also objects to a question the government asked of a DEA agent. The government asked whether, if an initial investigation of a suspect reveals no wrongdoing, the DEA discontinues its investigation. Matta argues that the question implied the ongoing investigations of Matta were evidence of his guilt. The court sustained Matta's objection but denied a mistrial.

The posing of this question, without more, cannot be said to have affected the fairness of the entire trial. The jury had already heard a great deal of independent evidence that Matta was engaged in wrongdoing. And the court sustained Matta's objection before the witness had answered. Matta was not so prejudiced by this question as to require a new trial.

Matta also argues that in closing argument, the government referred to stricken testimony. Matta did not object to the argument, and his claim is reviewed for plain error. *United States v. Feldman*, 853 F.2d 648, 652 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989).

In its closing argument the government did refer indirectly to stricken testimony. The testimony was that of a DEA agent who said that Matta had been untruthful after his arrest. But even if the jury considered and accepted the DEA agent's testimony that Matta was untruthful, that would not have changed the result in this case. In light of the substantial evidence of Matta's guilt, an opinion of one DEA agent about Matta's honesty is extremely unlikely to have made a difference one way or another. The reference to stricken testimony does not warrant reversal.

Finally, Matta argues that in its summation at the end of

trial, the government vouched for its own and its witnesses' credibility. A prosecutor's improper closing argument warrants reversal only if it "rises to the level of plain error." *United States v. Lopez,* 803 F.2d 969, 972 (9th Cir. 1986), *cert. denied,* 481 U.S. 1030 (1987).

We have repeatedly stated that "a prosecuting attorney may not and should not vouch for witnesses." *United States v. Smith,* 962 F.2d 923, 933 (9th Cir. 1992); *United States v. Kerr,* 981 F.2d 1050, 1051 (9th Cir. 1992). However, both the Ninth Circuit and the Supreme Court have recognized an exception to this rule. Where the defense impugns the prosecutor's integrity or implies the prosecutor coached witnesses or suborned perjury, the prosecutor's subsequent vouching may be deemed "invited" and thus excused. *E.g., United States v. Lopez-Alvarez,* 970 F.2d 583, 598 (9th Cir.), *cert. denied,* 113 S. Ct. 504 (1992); *United States v. Young,* 470 U.S. 1, 17-20 (1985).

Matta is correct that the government vouched for the credibility of its witnesses. However, Matta clearly invited such a response. First, the defense clearly accused the government of coaching its witnesses:

> Mr. Connolly suggests that memories improve, perhaps, like wine and cheese with age. What happened six years ago can be remembered like that. . . .
>
> Memories do not get better with age. They get better with coaching. They get better with suggestion. They get better if you understand what the interrogator who is asking you questions wants out of you for an answer.

Second, the defense accused the government of putting made-up facts before the jury:

> Was a dog used to sniff the automobile to find out if there was cocaine to give them a reason to open the car or not? Who knows? Probably not significant at this stage but another example of how whole facts — a whole set of facts can get made up or misplaced and put before somebody like yourself where you have to judge what is going on. A whole set of facts, not a simple mistake, a whole set of facts that the dog was there and scratched the paint off the car.

Third, the defense suggested that the government had thrown its credibility and prestige behind evidence and arguments:

> Now, why is that? Why [is "M-7" Matta's code name on the radio tapes]? That does not make any sense at all except . . . that the government wants you to believe it because they are the government. That is why.

In responding to these allegations, the government did not create plain error.

G. *The Witness Protection Program*

Matta assigns error to the district court's jury instruction concerning the federal witness protection program. The district court's formulation of jury instructions is reviewed for an abuse

of discretion. *United States v. Joetzki,* 952 F.2d 1090, 1095 (9th Cir. 1991).

Matta objects to the portion of the jury instruction that indicated that the Attorney General is authorized to enroll witnesses in the protection program "whenever in his judgment testimony from . . . a witness would place his life or person or the life or person of a member of his family or household in jeopardy." Matta's concern is that this instruction suggested he was dangerous or had threatened witnesses. However, we have upheld an instruction stating that to be included in the witness protection program, a witness "must satisfy the Attorney General that . . . he has reason to believe that his well-being, is in danger, his life or well-being, that he is threatened in some way." *United States v. Partin,* 601 F.2d 1000, 1010 n. 10 (9th Cir. 1979) (instruction given mid-trial), *cert. denied,* 446 U.S. 964 (1980).

In *Partin,* despite this clear implication that a witness was afraid, the court found no error. In reaching this conclusion the court noted (1) that the defense had itself raised the witness protection program for impeachment purposes, and (2) that in light of the other evidence in the case, the instruction "cannot be said to have tilted the jury toward a verdict of guilty." *Partin,* 601 F.2d at 1011.

The first factor, that the defense put the program in issue, is certainly present here. The second factor, that in light of the other evidence, the instruction did not "tilt" the jury toward guilt, is also satisfied here. This is true (1) because the other evidence of Matta's guilt was substantial, and (2) because of evidence that it was not Matta the witnesses feared, but other conspirators. *Cf. United States v. Castleberry,* 642 F.2d 1151, 1153 (9th Cir.) (extensive trial testimony about the witness protection program

not reversible error, where there was evidence that others, and not the defendants, were responsible for witnesses' fear), *cert. denied*, 452 U.S. 966 (1981). Thus, the court's jury instruction was not reversible error.

H. *The Aiding and Abetting Instruction*

Matta also challenges the district court's jury instructions regarding the aiding and abetting charges. Matta did not object to these instructions below, and the parties agree that a plain error standard governs this our review. *United States v. Castro*, 887 F.2d 988, 992 (9th Cir. 1989).

Matta argues that the aiding and abetting instruction failed to inform the jury that it was required not only to find him guilty beyond a reasonable doubt, but also to find Drummond, Matta's "abettee," to be guilty beyond a reasonable doubt.

It is true that "an alleged aider and abettor cannot be convicted unless there is proof beyond a reasonable doubt that the underlying offense was committed." [7] *United States v. Mann*, 811 F.2d 495, 497 (9th Cir. 1987).

Here, the court told the jury that the government must prove beyond a reasonable doubt that Matta "aided . . . John Drummond to distribute cocaine." This instruction was not reversible error. In order for the jury to find beyond a reasonable doubt that Matta "*aided* . . . John Drummond to distribute cocaine," it must first have found that Drummond did, in fact, distribute the cocaine. Consequently, the instruction was adequate.

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7. It is not true, however, that the government must prove who committed the crime.

Appendix E

I. *The Sentence*

Matta challenges his sentence of life imprisonment without the possibility of parole, which was imposed for the continuing criminal enterprise conviction. Matta has three objections to the sentence: (1) that the district court lacked jurisdiction to strike the parole provision, because Matta's notice of appeal had already been filed, transferring all jurisdiction to the Ninth Circuit; (2) that it was illegal for the district court to increase the severity of an existing sentence; and (3) that the life sentence was cruel and unusual punishment.

Each of these claims fails. While normally the filing of a notice of appeal deprives the district court of jurisdiction, there was a statutory exception to this rule at the time of Matta's resentencing Former Federal Rule of Criminal Procedure 35(a) provided that the district court "may correct an illegal sentence at any time. . . ." [8] *See Doyle v. United States,* 721 F.2d 1195, 1198 (9th Cir. 1983) (interpreting former Rule 35(a)).

Nor is Matta correct that his sentence, once entered, could not subsequently be modified in a manner that made it more severe. It is true that "the general rule is that a change in a legal sentence to increase the penalty it imposes violates the double jeopardy clause." *United States v. Wingender,* 711 F.2d 869, 870 (9th Cir. 1983). However, "there is no such bar to increasing an illegal or erroneous sentence." *Id.* (internal quotation marks and citation omitted). Here, the original sentence was clearly illegal. Under *Wingender,* the district court was entitled to amend its sentencing order to correct the illegality.

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8. This version of Rule 35(a) applies to convictions for crimes committed before November 1, 1987. *See* Fed. R. Crim. P. 35 (West Supp. 1992) (notes following rule).

Appendix E

Finally, Matta claims that his life sentence was cruel and unusual punishment because disproportionate to his offense. This claim also fails. We review "*de novo* the legality of a district court's sentence under the [E]ighth [A]mendment." *United States v. Bland*, 961 F.2d 123, 128 (9th Cir.), *cert. denied*, 113 S. Ct. 170 (1992).

Matta's claim of disproportionality is barred by, among other decisions, the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991). There, the Court upheld a life sentence without the possibility of parole for simple possession (as opposed to possession with the intent to distribute) of 672 grams of cocaine by a defendant with no prior felony convictions. It is inconceivable that the Supreme Court, having upheld the life sentence without parole of a first-time felon's possession of 672 grams of cocaine, would find an Eighth Amendment violation in this case.

J. *The Lesser Included Conspiracy Counts*

The government concedes it was improper to convict and sentence Matta on both the continuing criminal enterprises charge and the two conspiracy charges, the latter being lesser included offenses. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1582 (9th Cir. 1989) (vacating conspiracy convictions under 21 U.S.C. § 846, in light of conviction for continuing criminal enterprises under 21 U.S.C. § 848, *cert. denied*, 497 U.S. 1003 (1990).

In light of this error, Matta's conspiracy convictions must be vacated.

Matta's conspiracy convictions are **VACATED**. Matta's remaining convictions and sentences are **AFFIRMED**.

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 1, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-50336

D.C. No.
CR-87-00422-ER

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUAN RAMON MATTA-BALLESTEROS,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
January 4, 1993 — Pasadena, California
Submission Vacated April 7, 1994
Resubmitted June 6, 1994

Filed December 1, 1995

Before: James R. Browning, Cecil F. Poole,
and John T. Noonan, Jr., Circuit Judges.

Appendix F

Opinion by Judge Poole;
Concurrence by Judge Noonan

* * *

COUNSEL

Martin R. Stolar, Michael J. Burns, New York, New York, for the defendant-appellant.

Manuel A. Medrano, John L. Carlton, Assistant United States Attorneys; Los Angeles, California, and Sean Connelly, Joseph D. Wilson, United States Department of Justice; Washington, D.C., for the plaintiff-appellee.

OPINION

POOLE, Circuit Judge:

Appellant Juan Ramon Matta-Ballesteros appeals his convictions following jury trial on the following charges: (1) committing a crime of violence in aid of racketeering in violation of 18 U.S.C. § 1959; (2) conspiring to kidnap a federal agent engaged in his official duties in violation of 18 U.S.C. § 1201(c); and (3) kidnapping a federal agent engaged in his official duties in violation of 18 U.S.C. § 1201(a)(5). Matta-Ballesteros contends that the district court lacked jurisdiction over him and committed various reversible errors during his trial. We reject his arguments and affirm his convictions.

I

Rafael Caro-Quintero, Ernesto Fonseca-Carrillo, Miguel

Appendix F

Angel Felix-Gallardo, Ruben Zuno-Arce, Manuel Ibarra, Miguel Aldana and Javier Barba-Hernandez, all Mexican nationals, jointly operated a marijuana and cocaine trafficking enterprise centered in Guadalajara, Mexico.[1] The enterprise operated marijuana ranches in various Mexican locations.

Matta-Ballesteros, a Honduran, became involved with the enterprise in 1982 or 1983, and attended meetings where drug trafficking plans were discussed and decided. Felix-Gallardo and Matta-Ballesteros imported large amounts of cocaine into the United States on a number of occasions. At one point during their cocaine trafficking, Matta-Ballesteros and Felix-Gallardo grossed over $ 5 million a week from this enterprise.

During 1984, the Drug Enforcement Administration (DEA) made several significant seizures of marijuana and cocaine which resulted in substantial losses for the enterprise. At a gathering held after the baptism of Barba-Hernandez' daughter in Guadalajara in September 1984, members of the enterprise — with the exception of Matta-Ballesteros — discussed these losses and suggested that the DEA agent they believed was responsible should be "picked up."

At a meeting held prior to the wedding of Barba-Hernandez' brother in Guadalajara in October 1984, members of the enterprise, including Matta-Ballesteros, met and discussed the DEA seizures as well as a police report file covering one of the major marijuana seizures at Zacatecas, Mexico. The DEA agent responsible for the seizures was again discussed. The enterprise held yet another meeting after the wedding, in which Zuno-Arce

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1. Matta-Ballesteros was tried with Zuno-Arce and two other alleged coconspirators, Javier Vasquez-Velasco and Juan Jose Bernabe-Ramirez.

suggested that the DEA agent should be "picked up" when his identity was discovered.

By December 1984, Fonseca-Carrillo had identified the responsible DEA agent as Special Agent Enrique Camarena. Fonseca-Carrillo said that he would "take care of" Camarena. In February 1985, Zuno-Arce, Fonseca-Carrillo, Caro-Quintero and Barba-Hernandez met in Guadalajara and once again discussed picking up the DEA agent, finding out how much he knew, and learning who was cooperating with him.

Camarena disappeared on February 7, 1985 after leaving the DEA office in Guadalajara. Out-of-court statements, audiotapes and physical evidence, including hair, carpet fibers, sheet fabric and rope strands, showed that Camarena had been taken to a house at 881 Lope del Vega in Guadalajara, where he was held, tortured, interrogated and finally killed.

Matta-Ballesteros was seen checking out of a hotel in Guadalajara on February 12, 1985, apparently after learning he was under surveillance. Hairs consistent with Matta-Ballesteros's were found in the guest house and bedroom at Lope del Vega, suggesting his presence there sometime after the house had been recarpeted in January 1985.

On April 29, 1985, in Cartagena, Colombia, Matta-Ballesteros was detained by Colombian police on charges unrelated to Camarena's kidnapping and murder. The Colombian police took him to Bogata where DEA agents interviewed him. He denied participating in Camarena's murder but admitted having some knowledge of it, which he refused to share because he feared he would be killed if he did. The United States unsuccessfully sought Matta-Ballesteros's extradition on an

unrelated criminal complaint filed in the Southern District of New York and failed to follow through on extradition efforts with regard to a previously dismissed, but newly revived fourteen-year-old charge for escape from federal authorities. Matta-Ballesteros returned to Honduras.

Near dawn on April 5, 1988, Matta-Ballesteros was abducted from his home in Tegucigulpa, Honduras. Aided by Honduran Special Troops, or "Cobras," four United States Marshals bound his hands, put a black hood over his head, thrust him on the floor of a car operated by a United States Marshal, and drove him to a United States Air Force Base in Honduras. The Marshals then moved him to the United States, via the Dominican Republic. Within twenty-four hours of his armed abduction Matta-Ballesteros was a prisoner in the federal penitentiary at Marion, Illinois. The government does not dispute that he was forcibly abducted from his home in Honduras.

The government does dispute his account of how he was treated by his abductors. Matta-Ballesteros claims that while being transported bound and hooded to the United States Air Force Base he was beaten and burned with a stun gun at the direction of the Marshals. He claims that during his flight he was once again beaten and tortured by a stun gun applied to various parts of his body, including his feet and genitals.

Matta-Ballesteros unsuccessfully petitioned for a writ of habeas corpus. *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990), *cert. denied* 498 U.S. 878, 111 S. Ct. 209, 112 L. Ed. 2d 169 (1990). Subsequently, he was convicted in the Northern District of Florida for various narcotics charges and escape. These convictions were upheld on appeal. *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991).

Following that conviction, Matta-Ballesteros was brought before the Central District of California to face charges that he participated in the conspiracy to kidnap and kill Camarena. In the trial which we review, Matta-Ballesteros was charged, tried and convicted of the following: (1) committing, aiding and abetting or conspiring to commit a violent act in support of an enterprise engaged in racketeering, in violation of 18 U.S.C. § 1959; (2) conspiracy to kidnap a federal agent, in violation of 18 U.S.C. § 1201(c); and (3) participating in the kidnapping of a federal agent, in violation of 18 U.S.C. § 1201(a)(5). He was acquitted on charges of murdering a federal agent engaged in his official duties, in violation of 18 U.S.C. § 1111(a).

II

Matta-Ballesteros argues that because of his abduction from Honduras and his being beaten and interrogated during his trip to the United States, the district court was precluded from exercising jurisdiction over him. Specifically, Matta-Ballesteros argues that (a) the extradition treaties between Honduras and the United States prohibit his prosecution, and (b) the shocking nature of his abduction and mistreatment requires dismissal. We review this jurisdictional challenge de novo. *United States v. Walczak*, 783 F.2d 852, 854 (9th Cir. 1986).[2]

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2. The government argues that Matta-Ballesteros is collaterally estopped from litigating the jurisdiction issue in this court because that issue has already been fully and fairly litigated as to him in two other federal circuits in cases where he challenged jurisdiction on the same grounds, *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991) and *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 498 U.S. 878, 112 L. Ed. 2d 169, 111 S. Ct. 209 (1990). The government cites no authority showing that the jurisdictional decisions of these circuits have preclusive effect in this case. Both *United*

(Cont'd)

Appendix F

A

Matta-Ballesteros argues that the extradition treaties between Honduras and the United States preclude his prosecution because of the recent Supreme Court ruling that treaties are self-executing and bestow rights upon individuals. *United States v. Alvarez-Machain*, 504 U.S. 655, 119 L. Ed. 2d 441, 112 S. Ct. 2188 (1992). However, *Alvarez-Machain* primarily holds that where the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national. *Id.* at 664-66. *Alvarez-Machain* therefore dictates that, in the absence of express prohibitory terms, a treaty's self-executing nature is illusory.

The treaties between the United States and Honduras contain preservations of rights similar to those which *Alvarez-Machain* held did not sufficiently specify extradition as the only way in which one country may gain custody of a foreign national for purposes of prosecution. *Compare* 504 U.S. at 665-66 *with* 1909 Honduras-United States Extradition Treaty (37 Stat. 1616;

(Cont'd)

States v. Cauwenberghe, 934 F.2d 1048 (9th Cir. 1991) and *United States v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992) involve collateral attacks to final judgments, not independent jurisdictional challenges. All of the other cases cited by the government involve similar situations where a party sought collaterally to challenge an adverse judgment on jurisdictional grounds, calling into question the doctrine of res judicata, not collateral estoppel. *Durfee v. Duke*, 375 U.S. 106, 111-12, 11 L. Ed. 2d 186, 84 S. Ct. 242 (1963); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982). None of these cases stand for the proposition that there is collateral estoppel effect as to the litigation of similar jurisdictional issues in unrelated cases. That is the issue before this court.

45 Stat. 2489), Art. VIII; 1933 Inter-Americas Extradition Treaty (49 Stat. 3111), Arts. II-IV, XXI. Nothing in the treaties between the United States and Honduras authorizes dismissal of the indictment against Matta-Ballesteros.

B

The Supreme Court has long held that the manner by which a defendant is brought to trial does not affect the government's ability to try him. *Ker v. Illinois,* 119 U.S. 436, 444, 30 L. Ed. 421, 7 S. Ct. 225 (1886); *Frisbie v. Collins,* 342 U.S. 519, 522, 96 L. Ed. 541, 72 S. Ct. 509 (1952).

Though we may be deeply concerned by the actions of our government, it is clear in light of recent Supreme Court precedent that the circumstances surrounding Matta-Ballesteros's abduction do not divest this court of jurisdiction in this case. Since we have already concluded that the relevant treaty does not prohibit the abduction, "the rule in *Ker* applies, and the court need not inquire as to how respondent came before it." *Alvarez-Machain,* 504 U.S. at 662. In the shadow cast by *Alvarez-Machain,* attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino,* 500 F.2d 267 (2d Cir. 1974), have been cut short.

In *Toscanino,* the defendant alleged that United States agents abducted him from Uruguay, pistol-whipped, bound, blindfolded, brutally tortured, and interrogated him for seventeen days, and finally drugged and brought him to the United States by airplane, all with the knowledge of an Assistant United States Attorney. *Id.* at 269-70. That court held that if Toscanino's allegations were true, his indictment was subject to dismissal

based on the federal court's supervisory powers over the administration of criminal justice first outlined by the Supreme Court in *McNabb v. United States*, 318 U.S. 332, 340-41, 87 L. Ed. 819, 63 S. Ct. 608 (1943). In holding that the supervisory powers of the court could require dismissal, *Toscanino* relied in part on Supreme Court decisions addressing other types of outrageous governmental conduct, including *Rochin v. California*, 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952)[3] and *United States v. Russell*, 411 U.S. 423, 431-32, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973).[4] *Toscanino*, 500 F.2d at 274-76.

This court has held, however, that we have inherent

3. The *Toscanino* court relied upon *Rochin* and other Supreme Court decisions since *Ker* that it believed had effectively overruled the *Ker-Frisbie* doctrine in holding that due process required dismissal. *Id.* at 275. The *Toscanino* court stated that the *Ker-Frisbie* doctrine could not "be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." *Id.*

Later Supreme Court cases illustrate that the *Toscanino* court was not prescient. The Supreme Court has consistently reaffirmed the *Ker-Frisbie* doctrine, most recently in *Alvarez-Machain*. Additionally, the Court has held that a defendant's body is not a suppressible fruit, and the illegality of a defendant's detention cannot deprive the government of the opportunity to prove his guilt. *Gerstein v. Pugh*, 420 U.S. 103, 119, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975); *United States v. Crews*, 445 U.S. 463, 474, 63 L. Ed. 2d 537, 100 S. Ct. 1244 (1980). Thus, the court should only consider dismissing the indictment based upon its supervisory powers.

4. *Russell* cited *Rochin* as support for the proposition that "due process principles [could] absolutely bar the government from invoking judicial processes to obtain an conviction. . . ." *Russell*, 411 U.S. at 431-32.

supervisory powers to order dismissal of prosecutions for only three legitimate reasons: (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct. *United States v. Simpson*, 927 F.2d 1088, 1090, *cert. denied*, 484 U.S. 898, 98 L. Ed. 2d 192, 108 S. Ct. 233 (1987). *See also United States v. Hasting*, 461 U.S. 499, 505, 76 L. Ed. 2d 96, 103 S. Ct. 1974 (1983); *United States v. Gatto*, 763 F.2d 1040, 1044 (9th Cir. 1985). We review dismissal based on the exercise of supervisory powers for an abuse of discretion. *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991).

The circumstances surrounding Matta-Ballesteros's abduction, while disturbing to us and conduct we seek in no way to condone, meet none of these criteria. It is particularly troublesome to us that the alleged acts were conducted by United States Marshals, officials who purportedly act in our best interest. Although they are members of the Executive Branch, Marshals serve a very special purpose within the judiciary, because their "primary role and mission [is] to provide for the security and to obey, execute, and enforce, all orders of the United States District Courts, the United States Courts of Appeals, and the Court of International Trade." 28 U.S.C. § 566(a). While it may seem unconscionable to some that officials serving the interests of justice themselves become agents of criminal intimidation, like the DEA agents in Alvarez-Machain, their purported actions have violated no recognized constitutional or statutory rights. They have likewise engaged in no illegal conduct which this court could attempt to deter in the future by invoking its supervisory powers.[5]

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5. *Matta-Ballesteros's* abduction, even if we labelled it a "kidnapping," (Cont'd)

Appendix F

The *only* way we could exercise our supervisory powers in this particular case is if the defendant could demonstrate governmental misconduct "of the most shocking and outrageous kind," so as to warrant dismissal. *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980). *See also United States v. Fielding*, 645 F.2d 719, 723 (9th Cir. 1981) and *Leiterman v. Rushen*, 704 F.2d 442, 443 (9th Cir. 1983). Matta-Ballesteros has not. His alleged treatment, even if taken as true, does not meet this rigorous standard, and the acts alleged were not nearly as egregious as those committed in *Toscanino*.

The district court conducted a limited evidentiary hearing, concluding that Matta-Ballesteros failed to make "'a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States.' *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985, 46 L. Ed. 2d

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(Cont'd)
does not violate recognized constitutional or statutory provisions in light of *Alvarez-Machain*. Kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. *Jus cogens* norms, which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939-40 (D.C. Cir. 1988). While Art. 9 of the Universal Declaration of Human Rights does state that no one "shall be subjected to arbitrary arrest, detention or exile," G.A. Res. 217A(III), 3(1), U.N. GAOR Resolutions 71, U.N. Doc. A1810 (1940), kidnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) ("We conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.").

302, 96 S. Ct. 392 (1975). Defendant's allegations of mistreatment, even if taken as true, do not constitute such barbarism as to warrant dismissal of the indictment under the caselaw." [Excerpts of Record 60] The district court's findings are reviewed for clear error. *Fielding*, 645 F.2d at 724.

During the evidentiary hearing, the court heard testimony from Matta-Ballesteros about the purported torture, and he submitted pictures taken upon his arrival at the federal prison as well as a report on stun guns and the declarations of several eyewitnesses who declared he was shocked with the stun guns. The court also considered testimony or declarations from a psychologist and two physicians who examined Matta-Ballesteros, Dr. Donald Valles and Dr. John Van der Decker, who indicated that the cause of his injuries was inconclusive. Additionally, the court considered the declarations and testimony of Juan Morales and Roberto Escobar, United States Marshals who were present at Matta-Ballesteros's capture in Honduras, and who transported him from the Dominican Republic to Marion. They contradicted his testimony, and alleged that he was not tortured and that no stun gun was used on him.

While we may have a suspicion of Matta-Ballesteros's inhumane treatment, and the evidence reasonably could support a finding that he was tortured, it could also support the conclusion of the district court. Because the district court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse it even though we may be convinced that, sitting as the trier of fact, we would have weighed the evidence differently. *Employees Int'l Union v. Fair Political Practices*, 955 F.2d 1312, 1317 n.7 (9th Cir.) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)), *cert. denied*, 112 S. Ct. 3056 (1992). We

are therefore bound by the district court's findings, and hold that its determination regarding the alleged torture was not clearly erroneous.

Thus, much as we may want to dismiss this case through an exercise of our supervisory powers, to do so would be unwarranted. The district court did not abuse its discretion in refusing to exercise such powers.[6] In retaining jurisdiction of this case, we now turn to the specifics of Matta-Ballesteros's appeals.

III

Matta-Ballesteros argues that the evidence against him was insufficient to support his conviction. In considering a challenge to the sufficiency of the evidence, we decide, after viewing the evidence in the light most favorable to the government, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Aichele*, 941 F.2d 761 (9th Cir. 1991).

The essential elements of a conspiracy are (1) an agreement to accomplish an illegal objective, (2) the commission of an overt act in furtherance of the conspiracy, and (3) the requisite intent necessary to commit the underlying offense. *United States v. Thomas*, 887 F.2d 1341, 1347 (9th Cir. 1989). An agreement may be inferred from the defendant's acts pursuant to the scheme, or other circumstantial evidence, and a defendant's

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6. As the government suggests, the availability of civil damages may be a sufficient remedy for the misconduct alleged by Matta-Ballesteros. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

proximity to the scene of illicit activity may support an inference when viewed in context with other evidence. *Id.* at 1347-48. Once the existence of a conspiracy is shown, the government need only prove a slight connection between the defendant and the conspiracy. *Aichele*, 941 F.2d at 763-64. A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the codefendants' actions. Acts which seem otherwise innocent, when viewed in the context of the surrounding circumstances, may justify an inference of complicity. *Id.; see also United States v. Sanchez-Mata*, 925 F.2d 1166, 1168 (9th Cir. 1991).

The evidence showed that Matta-Ballesteros was a member of the Guadalajara cartel and that he participated in some of the meetings with other members of the cartel where Camarena's kidnapping was planned.[7] The evidence also showed members of the cartel abducted, tortured and murdered Camarena. The testimony of Hector Cervantes-Santos, which the jury believed and which is not inherently incredible, tied Matta-Ballesteros specifically to the crime. Thus, the evidence was sufficient to show that Matta-Ballesteros was involved in a conspiracy

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7. Matta-Ballesteros cites *United States v. DePew*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873, 116 L. Ed. 2d 169, 112 S. Ct. 210 (1991), as support for his contention that he had no intent to kidnap a specific DEA agent, Camarena, even if the evidence against him is viewed in the light most favorable to the government. However, *DePew* does not support his argument. The *DePew* court held that there was sufficient evidence of a conspiracy to kidnap because although "every detail of their plan had not been agreed upon, the essential nature of the plan was in place. . . ." *Id.* at 326. Indeed, the evidence of intent to kidnap a specific person was absent in *DePew*, where the conspiracy was to kidnap a young boy of approximately 12 years of age. *Id.* In this case, the evidence shows that, whether or not his name was known at all times, Camarena was the target of the conspiracy.

targeted at Camarena. Furthermore, because a conspirator is liable for all foreseeable substantive offenses committed in furtherance of the conspiracy, *Pinkerton v. United States*, 328 U.S. 640, 646-47, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946), there was also sufficient evidence to support his conviction on the substantive charges.[8]

IV

Matta-Ballesteros argues that the district court erred in not granting him a new trial because the jurors knew about his prior convictions during the deliberations on his charges. Where extraneous materials are presented to the jury, the defendant will receive a new trial if we find a reasonable possibility that the material could have affected the verdict. *United States v. Maree*, 934 F.2d 196, 201 (9th Cir. 1991) (citing *United States v. Madrid*, 842 F.2d 1090, 1093-94 (9th Cir.), *cert. denied*, 488 U.S. 912, 102 L. Ed. 2d 257, 109 S. Ct. 269 (1988)). We review the district court's findings as to historical facts relating to the issue of jury misconduct for clear error. *United States v. Shirley*, 884 F.2d 1130, 1132 (9th Cir. 1989).

The district court denied Matta-Ballesteros's motion. *See United States v. Caro-Quintero*, 769 F. Supp. 1564 (C.D. Cal. 1991). The court held that the single juror who testified that the jury had access to extraneous information during its deliberation on the charges against Matta-Ballesteros was not credible, based on the contradiction between his testimony during the *in camera*

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8. Additionally, the jury could have properly convicted him as an aider and abettor in the commission of a violent act under 18 U.S.C. § 1959 and as a participant in the kidnapping or confinement of Camarena under 18 U.S.C. § 1201(a)(5).

examination,[9] his declaration, and his testimony at the evidentiary hearing. We review the trial court's ruling on the credibility of a witness for clear error. *United States v. Clawson*, 831 F.2d 909, 914 (9th Cir. 1987), *cert. denied*, 488 U.S. 923, 102 L. Ed. 2d 323, 109 S. Ct. 303 (1988). Furthermore, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985).

This case is no exception. The single juror's testimony contradicted the testimony of other jurors as well as his own prior testimony. The juror's testimony also was vague as to exactly when he learned of Matta-Ballesteros's prior convictions

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9. Matta-Ballesteros further argues that the district court's findings regarding the jury's access to extraneous information are erroneous because the court initially examined the jurors without all counsel present and refused to allow counsel to examine the jurors. The district court has broad discretion to determine the type of investigation which must be mounted, and a full-blown evidentiary hearing is not required. The district court's primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and, if so, whether it was prejudicial. *United States v. Boylan*, 898 F.2d 230, 258 (1st Cir.), *cert. denied*, 498 U.S. 849, 112 L. Ed. 2d 106, 111 S. Ct. 139 (1990); *see also United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986), *cert. denied*, 483 U.S. 1008, 97 L. Ed. 2d 740, 107 S. Ct. 3235 (1987) (stating that "not every allegation that extraneous information hasreached the jury requires a full-dress hearing.") The district court gave counsel transcripts from the *in camera* hearing and allowed them to submit proposed questions to the court. This procedure was sufficient. The record reflects that the district court sufficiently developed the facts surrounding this issue.

and the substance of what he learned about them before a verdict was reached. This testimony provides no basis for finding that the jury received extraneous information. Therefore, the district court's finding that the jury did not have access to extraneous information is not clearly erroneous.

V

Matta-Ballesteros argues that the district court erred in (1) denying his motion to exclude hair comparison evidence as untimely, and (2) admitting expert testimony regarding hair comparison. We review both of these rulings for an abuse of discretion. *United States v. Vasquez,* 858 F.2d 1387, 1389 (9th Cir. 1988), *cert. denied*, 488 U.S. 1034, 102 L. Ed. 2d 978, 109 S. Ct. 847 (1989); *United States v. Christophe*, 833 F.2d 1296 (9th Cir. 1987).

The motion cut-off date in this case was set by the district court pursuant to Fed. R. Crim. P. 12(c) at March 7, 1990. Matta-Ballesteros argues that his motion to exclude the hair comparison evidence, filed May 15, 1990, was filed as soon as possible. The record does not support this contention. The primary reason that Matta-Ballesteros gives for filing late, the government's intransigence in providing the hair samples, is not a reason for filing the motion late but is rather a reason for filing the motion earlier on different grounds. The district court did not abuse its discretion in denying the untimely motion pursuant to Fed. R. Crim. P. 12(f).

Furthermore, Fed. R. Evid. 702 did not warrant the exclusion of the expert testimony. Matta-Ballesteros's objection went to the weight, not the admissibility, of the testimony. *United States v. Oaxaca,* 569 F.2d 518, 526 (9th Cir.), *cert. denied*, 439 U.S.

926, 99 S. Ct. 310, 58 L. Ed. 2d 319 (1978). The jury was able to consider the fact that microscopic hair comparison could not determine that the hairs found at Lope del Vega belonged to Matta-Ballesteros's. This was acknowledged both on direct and on cross-examination, and Matta-Ballesteros's own expert testified on this issue. The jury was further able to evaluate the prosecution expert's conclusion in light of all the evidence and give it the appropriate weight. Therefore, the district court did not abuse its discretion in allowing the expert testimony.

VI

Matta-Ballesteros challenges the district court's exclusion of the evidence that he argues requires reversal of his conviction.

A

Matta-Ballesteros argues that the district court erred in excluding as inadmissible hearsay a report prepared by a psychologist who met with Matta-Ballesteros at the Marion prison, and a presentence report prepared by a probation officer. Matta-Ballesteros argues that these documents support his contention that he is illiterate and therefore could not have been seen reading the police reports of the Zacatecas drug seizure as the government's main witness, Hector Cervantes-Santos, Barba-Hernandez' former employee, testified. We review the district court's exclusion of evidence under the hearsay rule for an abuse of discretion. *United States v. George,* 960 F.2d 97, 99-100 (9th Cir. 1992).

The district court excluded the psychologist's report because it determined that Matta-Ballesteros's statement regarding his illiteracy was not made for purposes of medical diagnosis or

treatment. The court's ruling refers to Fed. R. Evid. 803(4), which provides an exception to the hearsay rule for "statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

The statement in the psychologist's report had nothing to do with Matta-Ballesteros's diagnosis or treatment. Indeed, Matta-Ballesteros was ordered to see the prison psychologist and did not even believe that he had any reason to see the psychologist. Matta-Ballesteros thus had no special incentive to be truthful. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, § 803(4)[02] (1992). Therefore, the district court did not abuse its discretion in excluding the psychologist's report under Rule 803(4).

The hearsay statement in the presentence report is not admissible to show that Matta-Ballesteros may be illiterate. "No firmly rooted exception to the hearsay rule can possibly apply to the Presentence Report." *United States v. Fortier*, 911 F.2d 100, 104 (8th Cir. 1990), *overruled on different grounds*, *United States v. Wise*, 976 F.2d 393 (8th Cir. 1992), *cert. denied*, 123 L. Ed. 2d 157, 113 S. Ct. 1592 (1993). The presentence report is not admissible at trial to prove any of the hearsay contained therein.

B

Matta-Ballesteros argues that the district court abused its discretion in excluding authenticated records from the four Guadalajara municipalities regarding the nonexistence of both

the marriage of Jorge Barba-Hernandez and the birth of Yuremi Barba-Hernandez, and in excluding Jorge Barba-Hernandez' Guadalajara death certificate. Matta-Ballesteros argues that these records prove facts inconsistent with Cervantes-Santos's testimony that Matta-Ballesteros had attended meetings on the occasion of Jorge Barba-Hernandez' wedding and Yuremi Barba-Hernandez' birth.

However, Matta-Ballesteros cannot establish the absence of public records under Fed. R. Evid. 803(10) because he failed to show as a preliminary matter under Fed. R. Evid. 104(b) that the events necessarily occurred in one of the four Guadalajara municipalities. There are 2,800 other municipalities in Mexico where the marriage and birth could have occurred. Furthermore, if only a religious marriage occurs or if parents do not register a child after birth, there may be no records at all. Finally, there was no legal requirement for prior marriages to be recorded on a death certificate, even if both were registered within the same municipality. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id.; see also United States v. Regner*, 677 F.2d 754, 758 n.3 (9th Cir.), *cert. denied*, 459 U.S. 911, 74 L. Ed. 2d 175, 103 S. Ct. 220 (1982) (affirming the admission of a government record under 803(10) based on evidence that foreign government-owned taxicab company owned all taxicabs and was legally required to record all accidents involving taxicabs). Therefore, the district court did not abuse its discretion in determining that the conditional relevance requirements had not been met and in excluding the records from these four municipalities.

Appendix F

VII

Matta-Ballesteros argues that the district court erred in admitting audiotape recordings of Camarena's torture and interrogation at Lope del Vega because (1) there was an inadequate showing of authenticity and chain of custody, and (2) the tapes and transcripts were unduly prejudicial under Fed. R. Evid. 403. We review the district court's ruling for an abuse of discretion. *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir.), *cert. denied*, 474 U.S. 1022, 88 L. Ed. 2d 557, 106 S. Ct. 574 (1985); *United States v. Layton*, 855 F.2d 1388, 1402 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046, 103 L. Ed. 2d 244, 109 S. Ct. 1178 (1989).

Matta-Ballesteros incorrectly asserts that the district court failed to comply with the requirements for admitting tape recordings into evidence set forth in *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916, 43 L. Ed. 2d 782, 95 S. Ct. 1577 (1975).[10] The Eighth Circuit has said that "when the facts demonstrate that the recording was found in a defendant's possession, it should not be subject to the same requirements we apply when a government agent or informant initiates a conversation knowing it is to be recorded. . . . Under such circumstances mechanical or wooden application of the *McMillan* requirements is [not] necessary."

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10. *McMillan* requires the proponent of such evidence to show (1) the recording device was capable of taping the conversation; (2) the operator was competent to operate the device; (3) the recording was authentic and correct; (4) no changes, additions or deletions have been made in the recording; (5) the recording is shown to have been preserved; (6) the speakers are identified; and (7) the elicited conversation was made without inducement. *Id.*

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United States v. O'Connell, 841 F.2d 1408, 1420 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989).

The audiotapes were obtained from one of Matta-Ballesteros's codefendants. Under such circumstances, we have held that tapes are sufficiently authenticated under Fed.R. Evid. 901(a) if "sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *Black*, 767 F.2d at 1342, (citing 5 J. Weinstein & M. Berger, *Weinstein's Evidence* Par. 901(a)[01], at 901-16 to 17 (1983)). This is done by proving a connection between the evidence and the party against whom the evidence is admitted, and can be done by both direct and circumstantial evidence. *Id.* The district court did not abuse its discretion in admitting the tapes because the government presented evidence to show that it had not tampered with the tapes and that the speakers were parties involved in this case. We have found similar showings to be sufficient in other cases. *See O'Connell*, 841 F.2d at 1420-21; *United States v. Kandiel*, 865 F.2d 967, 974 (8th Cir. 1989).

The district court also did not abuse its discretion despite the defects in chain of custody. The prosecution must introduce sufficient proof so that a reasonable juror could find that tapes are in substantially the same condition as when they were seized, and may admit the tapes if there is a reasonable probability the tapes have not been changed in important respects. *United States v. Harrington*, 923 F.2d 1371 (9th Cir.), *cert. denied*, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991) (citing *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960)). Furthermore, a defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced. *United States v. Robinson*, 967 F.2d 287, 292 (9th Cir. 1992) (citing *United States*

v. Candoli, 870 F.2d 496, 509 (9th Cir. 1989)). The evidence presented by the prosecution is sufficient to meet this burden, and there is arguably no defect in the chain of custody since there is evidence tracing the tapes from Matta-Ballesteros's codefendant's possession to trial.

The probative value of the tapes was not outweighed by their prejudicial nature. The tapes were submitted as evidence not only to show what was said but also to rebut the defendants' assertion that Camarena's injuries could have occurred after his death, and to show the intent and motive of Camarena's kidnappers. These legitimate purposes, along with the district court's limiting instruction, show that the court did not abuse its discretion in determining that the tapes were not unduly prejudicial despite their gruesome content. We give "wide latitude to the trial judge in determining the admissibility of evidence because he is in the best position to assess the impact and effect of evidence based upon what he perceives from the live proceedings of the trial, while we can review only a cold record." *United States v. Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981). The district court properly admitted the tapes.

VIII

Matta-Ballesteros argues that the district court erred in evaluating the effect of pretrial identification procedures and in determining that Cervantes-Santos's in-court identification was not impermissibly tainted. We review the constitutionality of pretrial identification procedures de novo. *United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984); *see also United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991). To determine whether an identification procedure is so impermissibly tainted as to give

rise to a substantial likelihood of mistaken identification and thereby a violation of due process, we review the totality of the circumstances. *See Simmons v. United States*,390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968).

Cervantes-Santos had an opportunity to observe Matta-Ballesteros at the two meetings and over approximately a one day period in October 1984. In January 1990, Cervantes-Santos was shown a collection of 97 photographs of various suspects, including Matta-Ballesteros. Prior to testifying, Cervantes-Santos was shown photographs of Matta-Ballesteros and other Camarena defendants. However, Cervantes-Santos was never told that any person in any photograph was Matta-Ballesteros.

The pretrial procedure was not impermissibly suggestive, and therefore did not violate due process. *See United States v. Bagley,* 772 F.2d 482 (9th Cir. 1985), *cert. denied,* 475 U.S. 1023, 89 L. Ed. 2d 326, 106 S. Ct. 1215 (1986). There is no record in this case that Cervantes-Santos was told or led to believe that any person in any of the pictures that he was shown prior to his in-court identification was Matta-Ballesteros. While Matta-Ballesteros's picture was not shown among a more conventional photo array, where similar looking individuals or people who are not suspects are also shown, there is no basis for concluding that the procedure here was impermissibly suggestive.

In any event, the totality of the circumstances suggests that the in-court identification was reliable. *Id.* The circumstances to be considered are (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by the

witness at confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). Cervantes-Santos had a great deal more time to view Matta-Ballesteros than many witnesses have to view a defendant, and spent much of that time in the same room with him. Cervantes-Santos was also able to describe Matta-Ballesteros's appearance in 1984 in detail during his testimony. Finally, Cervantes-Santos correctly identified Matta-Ballesteros in court. The intervening six years between Cervantes-Santos's observation and in-court identification do not make the latter unreliable.

IX

Matta-Ballesteros argues that the district court erred in quashing his subpoena requesting discovery on the United States government's alleged authorization of the racketeering enterprise alleged in the indictment pursuant to Fed. R. Crim. P. 16(a). Matta-Ballesteros also argues that, as a result, the district court erred in excluding relevant evidence. We review these rulings for an abuse of discretion. *United States v. Polizzi*, 801 F.2d 1543, 1551 (9th Cir. 1986); *United States v. Harrington*, 923 F.2d 1371, 1374 (9th Cir.), *cert. denied*, 502 U.S. 854, 116 L. Ed. 2d 128, 112 S. Ct. 164 (1991). Underlying factual determinations are reviewed for clear error. *United States v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988), *cert. denied*, 492 U.S. 906, 106 L. Ed. 2d 565, 109 S. Ct. 3215 (1989).

Matta-Ballesteros and other defendants attempted to assert a defense of public authority. *See* Fed. R. Crim. P. 12.3. The defendants primarily relied on a news article concerning an alleged connection between Felix-Gallardo, the CIA, and the

Nicaraguan Contras with respect to arms smuggling.[11] The defendants also relied on testimonyfrom a government witness, Lawrence Harrison. Ultimately, however, Harrison testified that he had no personal knowledge of CIA involvement with drug traffickers in Mexico.

The court's determination that there was no evidence of a connection between the defendants' activities and the government, and that the subpoena was not likely to lead to the discovery of relevant evidence, was not clearly erroneous. There was no showing that any relationship between Felix-Gallardo, the CIA, and the Nicaraguan Contras amounted to United States government approval of the narcotics enterprise alleged in the indictment. Indeed, the evidence at trial concerning the DEA's aggressive enforcement of the United States' laws against narcotics trafficking showed exactly the opposite.[12] A defendant is not entitled to government documents relating to alleged CIA involvement in his criminal activity where no sufficient showing of potential relevance has been made under Fed. R. Crim. P. 16. *See United States v. Little*, 753 F.2d 1420, 1444-45 (9th Cir. 1984). Therefore, the district court did not abuse its discretion in quashing the subpoena and, consequently, in excluding evidence of CIA authorization.

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11. Jeff Gerth, *CIA Shedding Its Reluctance to Aid in Fight Against Drugs*, N.Y. Times, March 25, 1990 at A1, A22.

12. Furthermore, this defense would probably fail as a matter of law. "The CIA is prohibited from violating the statutes of the United States and hence, a CIA agent could not lawfully authorize the violation of the federal drug laws." *United States v. Rosenthal*, 793 F.2d 1214, 1235 (11th Cir. 1986), *cert. denied*, 480 U.S. 919, 94 L. Ed. 2d 692, 107 S. Ct. 1377 (1987).

Appendix F

X

Matta-Ballesteros argues that the district court erred in denying his motion for severance and that joinder in this case was improper and prejudicial under Fed. R. Crim. P. 8(a), 8(b), and 14. Generally, defendants jointly charged are jointly tried. *United States v. Hernandez*, 952 F.2d 1110, 1114 (9th Cir. 1991), *cert. denied*, 121 L. Ed. 2d 252, 113 S. Ct. 334 (1992). We review the district court's denial of severance for an abuse of discretion, and a defendant seeking reversal has the burden of proving clear, manifest or undue prejudice from a joint trial. *United States v. Joetzki*, 952 F.2d 1090, 1094 (9th Cir. 1991). The evidence of prejudice must demonstrate that Matta-Ballesteros was denied a fair trial. *Id.*

The gist of Matta-Ballesteros's argument is that he was joined and tried along with counts charging only his codefendants, whom he contends were engaged in an altogether different racketeering enterprise based on different acts or transactions.[13] Matta-Ballesteros further argues that the introduction of evidence involving three homicides[14] and a marijuana enterprise with which he was not involved prejudiced him.

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13. Counts Nine and Ten charged Bernabe-Ramirez (and others not on trial) with hindering a federal prosecution in violation of 18 U.S.C. § 3 for aiding in Caro-Quintero's escape from federal prison.

14. Counts One and Two charged Vasquez-Velasco (and others not on trial) with violence in aid of racketeering in violation of 18 U.S.C. § 1959 for the murders of American citizens John Walker and Alberto Redelat, who apparently were mistaken for DEA agents. Count Five charged Bernabe-Ramirez (and others not on trial) with violence in aid of racketeering in violation of 18 U.S.C. § 1959 for the murder of DEA helicopter pilot Alfredo Zavala-Avelar.

These arguments are without merit. The codefendants' charges bore a relationship to one another. Because all of the defendants, including Matta-Ballesteros, were charged with conspiring to commit and committing violent acts in furtherance of drug enterprises having similar memberships and objectives, Matta-Ballesteros was not prejudiced by joinder. "The term 'transactions' has a flexible meaning" and there can be a "logical relationship between the transactions greater than the mere factual similarity of events." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2332 (1993) (citing *Ford*, 632 F.2d at 1371-72). Additionally, the fact that more evidence was introduced against his codefendants is insufficient to show that joinder was improper. *Polizzi*, 801 F.2d at 1554.

Furthermore, there was no prejudice from the joinder because the jury was able to compartmentalize the evidence on the various counts against each defendant. *See Felix-Gutierrez*, 940 F.2d at 1210. The district court instructed the jury several times during trial that evidence was not admitted against one or more codefendants, and gave a general limiting instruction to the jury before deliberations. These instructions militate against Matta-Ballesteros's prejudice claim. "Judicial economy justifies reliance on the jury to follow the instructions of the court that segregate the evidence and limit the applicability of the evidence to each defendant." *United States v. Vaccaro*, 816 F.2d 443, 448 (9th Cir.), *cert. denied*, 484 U.S. 928, 98 L. Ed. 2d 255, 108 S. Ct. 295 (1987). The district court did not abuse its discretion in trying Matta-Ballesteros as he was charged.

XI

Matta-Ballesteros argues that the district court erred in

instructing the jury regarding his liability under 18 U.S.C. § 1959. Matta-Ballesteros contends that the district court's instruction that he could be found guilty of violating section 1959 if he "participated in the commission of a violent act as charged . . . or aided and abetted in the commission of the violent acts as charged or . . . conspired in the commission of the violent acts as charged" added an uncharged crime to the indictment. Matta-Ballesteros further contends that, due to this instruction, there is no way of determining whether he was convicted based on a unanimous verdict. An assertion that the trial court's jury instructions misstated the elements of a crime is a question of law that we review de novo. *United States v. Streit*, 962 F.2d 894, 898 (9th Cir.), *cert. denied*, 121 L. Ed. 2d 352, 113 S. Ct. 431 (1992). We determine whether, viewing the instructions as a whole, the court gave adequate instruction, and whether the instruction was misleading or stated the law incorrectly to the prejudice of the objecting party. *United States v. Terry*, 911 F.2d 272, 279 (9th Cir. 1990) (citations omitted).

There is no merit to Matta-Ballesteros's argument. Count Four of the indictment charged that Matta-Ballesteros "did aid, abet, counsel, induce, procure, cause and otherwise willfully participate" in a violation of 18 U.S.C. § 1959. The district court dismissed Count Three of the indictment, which charged Matta-Ballesteros in a conspiracy to violate section 1959, because it determined that this count was duplicitous of Count Four. In dismissing Count Three, the district court held, and Matta-Ballesteros agreed, that Count Four contained a conspiracy charge; no additional crime was added to the indictment in the jury instructions. Furthermore, the court instructed the jury that "unanimous agreement among the jurors that the defendant engaged in at least one of the types of conduct" was required. This is sufficient to ensure a unanimous verdict. *See United*

States v. Castro, 887 F.2d 988, 991 (9th Cir. 1989); *United States v. Frazin*, 780 F.2d 1461, 1468 (9th Cir.), *cert. denied*, 479 U.S. 844, 93 L. Ed. 2d 98, 107 S. Ct. 158 (1986). There was no error in the district court's instruction.

Matta-Ballesteros also argues that, due to the instruction, there is no way of determining whether he was properly sentenced. This issue is of no moment. Matta-Ballesteros's contention that he would be subject to a lesser sentence if the jury convicted him of conspiracy under 18 U.S.C. § 371 ignores the holding in *Pinkerton*, 328 U.S. at 646-47, which makes conspirators liable for every substantive offense committed in furtherance of the conspiracy. Furthermore, Matta-Ballesteros was subject to the same sentence under section 1959, either as a primary participant, aider and abettor, or conspirator. 18 U.S.C. § 1959(a)(1).

None of the alleged errors committed by the district court afford Matta-Ballesteros any relief. The judgment of the district court is therefore **AFFIRMED**.

NOONAN, Circuit Judge, concurring:

This case has been pending in this court for nearly two years. The long delay in decision does not reflect inattention or negligence but the great uncertainty the court has experienced in dealing with the situation where our jurisdiction was brought about by the kidnapping of the defendant from Honduras, a kidnapping performed by United States Marshals.

What This Case Is Not. This case does not involve the kidnapping by a private citizen of a defendant residing in a foreign country and wanted for an offense against the statute of

a particular state of the United States and the subsequent placing of the kidnapped person on trial in the state's court. *Ker v. Illinois*, 119 U.S. 436, 30 L. Ed. 421, 7 S. Ct. 225 (1886).

This case does not involve the kidnapping of a defendant from one state of the United States by police officers of another one of the states, and his removal for trial to the officers' state. *Frisbie v. Collins*, 342 U.S. 519, 96 L. Ed. 541, 72 S. Ct. 509 (1952).

This case does not involve the removal of the head of state of a foreign country by the military forces of the United States, acting at the direction of the President as Commander-in-Chief in an action found to be "military war," and the subsequent federal trial of the person removed. *United States v. Noriega*, 746 F. Supp. 1506, 1537 (S.D. Fla. 1990).

This case does not turn on the alleged violation of a treaty between the United States and the foreign country from which the defendant was removed to undergo trial in a federal court. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992).

This case does not turn on an alleged violation of international customary law. *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992).

This case does not turn on a protest by the sovereign of the country from which the defendant was abducted for trial in federal court; for there was no such protest. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259-260 (7th Cir. 1990).

This case does not turn on the Fourth Amendment rights of the abducted defendant. *Id.* at 262.

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This case does not turn on the due process rights of the abducted defendant as in *United States v. Toscanino,* 500 F.2d 267 (2d Cir. 1974), a case qualified by *United States ex rel. Lujan v. Gengler,* 510 F.2d 62 (2d Cir. 1975), *cert. denied,* 421 U.S. 1001, 44 L. Ed. 2d 668, 95 S. Ct. 2400.

This case is not to be decided by stray dicta from the above cases; for what a court does not have before it a court does not authoritatively address. Emanations and intimations of the views of the opinion writer no doubt can be gathered from the dicta. They are not the holding of the court. They do not operate as binding decisional precedent.

What The Case Is About. This case begins with the kidnapping at dawn, April 5, 1988, of Matta from his home in Tegucigulpa, Honduras. According to the affidavit of Juan J. Donato Morales, a United States Marshal, he and three other members of the United States Marshals Service were near Matta's residence. At about 6:00 a.m., six or seven Honduras officers grabbed Matta, wrestled him to the ground, and brought him to the car driven by Marshal Morales. The Honduran officers handcuffed Matta, put a hood over his head, and thrust him on the floor of the rear part of the car. Matta at this point was still struggling to escape. In the back seat were one Honduran officer and one United States Marshal; in front were another Honduran officer and Marshal Morales. Morales drove the car to an air base in Honduras. From there Matta was transported by air to the Dominican Republic. According to the testimony of United States Marshal Roberto Escobar, he was alerted by the Marshals' Service that Matta had been apprehended. He proceeded to the airport in the Dominican Republic with three other members of the Marshals' Service, met the plane from Honduras, took Matta into custody, and thereafter flew with him to United States

territory. Within twenty-four hours of his armed abduction Matta was in the federal penitentiary at Marion, Illinois. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 (7th Cir. 1990).

That this act of kidnapping occurred is not disputed by the government. There is dispute as to how Matta was treated by his kidnappers and that treatment is not considered further here. Kidnapping in itself is a violent attack upon a human person — a sudden invasion of personal security, a brutal deprivation of personal liberty. Kidnapping in itself is a cruel act, and the cruelty is magnified when the victim's home is the place where the violent assault upon his liberty is made. Kidnapping committed in a foreign country becomes an offense against federal law when the victim is transported by the kidnappers into the United States. *United States v. Garcia*, 854 F.2d 340 (9th Cir. 1988). The kidnapping continues as long as the victim is not released by the abductors. *Id.* at 343.

At the birth of our republic we submitted to the "opinions of mankind" and "a candid world" our reasons why Great Britain had become destructive of the ends for which government was necessary. Among our list of complaints was that Americans were "taken Captive on the high seas" and forcibly conscripted, and that others were transported "beyond Seas to be tried for pretended offenses." *Declaration of Independence* in 1 *The Founder's Constitution* (eds. Philip B. Kurland & Ralph Lerner) at 9-10.

If confirmation were wanted of the common view that humankind has of kidnapping it is furnished by Article 9 of the Universal Declaration of Human Rights which affirms that no one "shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217A(III), 3(1), U.N. GAOR Resolutions 71, U.N.

Doc. A1810 (1940). United Nations Security Council Resolution 579 (1985) lumps "acts of abduction" with "acts of hostage-taking" as "manifestations of international terrorism" and "*[c]ondemns unequivocally* all acts of hostage-taking and abduction." "Official Documents" 80 *Am. J. Int'l.*, 437, 438 (1986) (emphasis in original).

The motive of the kidnappers — here no doubt well-meaning in their officiousness — does not qualify the violence of their conduct nor its impact on the person whom they kidnap. That the abductors were law enforcement officers of the United States, rather than some fanatic band, doubles the horror of their activity. If agents of the mightiest power on earth are unrestrained from kidnapping by legal authority — or rather, in obedience to higher authority in the Executive Department, see themselves constrained to kidnap — the freedom of individuals throughout the world is at the mercy of a decision made by an official of the United States Department of Justice.

It is true that Israel abducted Adolf Eichmann to stand trial in Israel. Even that case with its extraordinary features met with the condemnation of the Security Council of the United Nations. S.C. Res. 138 (1960), 15 U.N. SCOR, 15th Year, Resolutions and Decisions at 4. Earlier precedent for governmental kidnapping is ugly. In the 1930s the Gestapo engaged in kidnapping in Switzerland. See "Kidnapping of Fugitives from Justice On Foreign Territory," *29 Am. J. Int'l L.*, 502 (1935). Neither Nazi precedent nor Israeli exception suggests that the common view of humanity is wrong in its abhorrence of armed abduction to a foreign land. *See* Betsy Baker and Volker Roben, "To Abduct Or To Extradite. Does A Treaty Beg The Question?" 53 *Zeitschrift fur auslandisches offentliches Recht and Volkerrecht* 657, 678-79 (1993).

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We are then confronted with a kidnapping, and we as judges are asked to be part of the kidnapping. We are asked to participate in two ways. First, the acts of the United States Marshals were directed to bringing Matta within the jurisdiction of the courts of the United States so that he might be tried for federal crimes and in particular for the crime of which he stands convicted in the Central District of California. The acts of the Marshals were not personal acts of revenge. Their purpose was to assure Matta's presence in the federal courts. Without the participation of the federal courts the kidnapping was purposeless. The federal courts are inextricably tied to the kidnapping because federal trial was the reason for abducting him.

If federal agents had boarded a foreign ship on the high seas and in an act of piracy removed Matta from the ship to bring him to federal trial in Los Angeles, we would not have wanted a federal judge to be a party to the piracy by conducting the trial. No more do we want federal judges to be parties to kidnapping, to be cooperators and collaborators in the cruel violence by standing ready to receive the kidnappers as they turn over their prey to their intended recipients. In the Noriega case, where the military character of Noriega's removal made judicial review impracticable, Judge Hoeveler wisely observed that otherwise the court would not be helpless "in the face of inhumane conduct shocking to the conscience." *United States v. Noriega*, 746 F. Supp. 1506, 1536 (S.D. Fla. 1990). He invoked the famous words of Justice Brandeis, which, uttered in dissent, have had a power that few majority opinions have achieved. They still speak eloquently here:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are

> commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (dissent), *overruled by Berger v. New York*, 388 U.S. 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873 (1967).

This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. *See United States v. Hasting*, 461 U.S. 499, 505, 76 L. Ed. 2d 96, 103 S. Ct. 1974 (1983). The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision

> of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

McNabb v. United States, 318 U.S. 332, 340, 87 L. Ed. 819, 63 S. Ct. 608 (1943). In *McNabb* the Supreme Court, without reaching the constitutional issues, excluded from evidence confessions obtained from suspects after lengthy, uncounseled interrogation prior to being brought before a magistrate. In this pre-*Miranda* case, Justice Frankfurter noted that "the principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." *Id.* at 341. *McNabb's* pre-*Miranda* posture provides helpful guidance to this post-*Alvarez-Machain* case because it teaches us that even where the Constitution does not explicitly prohibit certain reprehensible acts, federal courts exercising their supervisory powers must establish and maintain civilized standards.

The cases on which the majority relies do not address the exercise of our supervisory powers. *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980) dealt with an alleged abduction by DEA agents and spoke in the due process terms of Toscanino. *Id.* at 308-309. In *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981) there was "no showing whatsoever that the United States participated in any of that conduct [the alleged torture and

kidnapping in Peru]." *Id.* at 724. *Leiterman v. Rushen*, 704 F.2d 442 (9th Cir. 1983) is even further off the mark, applying Toscanino due process criteria to the conduct of local police officers. Toscanino itself did not involve the conduct of United States Marshals, but a member of the police in Montevideo, Uruguay, allegedly paid by the United States. *United States v. Toscanino*, 500 F.2d at 269. No precedent stands in the way of our use of our supervisory powers here.

We must, of course, exercise these powers over our business, not someone else's. *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991), *cert. denied* 484 U.S. 898, 98 L. Ed. 2d 192, 108 S. Ct. 233 (1987). We must exercise it for a recognized purpose — here, to deter future illegal conduct by the marshals. *Id.* The United States Marshals service is "a bureau within the Department of Justice under the authority and direction of the Attorney General." 28 U.S.C. § 561. The marshals have the authority to act as sheriffs within a state, 28 U.S.C. § 564, to execute lawful writs, 28 U.S.C. § 566(c) and to "investigate" fugitive matters, 28 U.S.C. § 566(e)(1). The marshals are given no authority to abduct wanted persons from a foreign country. The governing statute provides that it is "the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade," 28 U.S.C. § 566(a). When an agency whose primary mission is to obey our orders, and whose functions do not include overseas abductions, undertakes to kidnap from abroad a person for production in trial in a federal court, this action becomes our business. We are called to supervise cruel conduct designed to provide us with jurisdiction. We should not accept that jurisdiction except for one fact.

Appendix F

A decision of another federal court has broken the confinement caused by the abduction. After he was brought involuntarily to the United States, Matta was tried, convicted, and sentenced for various drug offenses; his conviction was affirmed in 1991. *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991). Matta's continued presence in the Central District of California is the result of that conviction.

At the time of this earlier conviction the United States was not a party to the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment, ratified in 1990, 136 Cong. Rec. S17491 (Oct. 27, 1990) and operative thirty days after its deposit by the President with the United Nations on October 21, 1994. Multilateral Treaties Deposited With The Secretary-General, UN Doc. No. 571 Leg/SER.E/13, IV.9 (1995). The relevance of the Treaty has not been argued in this court. The federal courts in the Eleventh Circuit were not asked to exercise their supervisory authority over the United States Marshals by dismissing the indictment; so this argument was waived. Matta was lawfully tried, convicted and imprisoned. He stands before us not as the victim of an abduction (which he once was) but as a lawfully-held prisoner. Accordingly, we need not dismiss the case.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JUNE 29, 1990

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 87-422-ER

UNITED STATES OF AMERICA

Plaintiff,

v.

RAFAEL CARO-QUINTERO, et al.

Defendants.

ORDER DENYING DEFENDANT MATTA'S MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT CONDUCT

On April 18 and 19, 1990, an evidentiary hearing was conducted on defendant Matta's motion to dismiss the indictment for outrageous government conduct in this Court, the Honorable Edward Rafeedie presiding. Shortly thereafter the parties filed supplemental briefs with the Court. Having read and considered the pleadings filed in this matter, the evidence elicited from the witnesses and submitted with the Court, and the evidence the Court ordered be submitted *in camera* by the government at defendant's request, IT IS HEREBY ORDERED that defendant's motion to dismiss for outrageous government conduct is denied.

Appendix G

I. *Ker-Frisbie* Doctrine

In *Ker v. Illinois*, 119 U.S. 436 (1886), the Supreme Court established the longstanding rule of law is that a forcible abduction does not offend due process nor does it require that courts dismiss an indictment for the loss of jurisdiction on those grounds. The Court reaffirmed this rule in *Frisbie v. Collins*, 342 U.S. 519 (1952). These cases form the basis of the *Ker-Frisbie* doctrine. In *Ker*, the defendant challenged his conviction alleging that he had been kidnapped in Peru and brought into Illinois to stand trial against his will. The Court held that forcible abduction is not a ground to challenge jurisdiction over the person. *Id.* at 444. In *Frisbie*, defendant sought a writ of habeas corpus challenging his detention in Illinois alleging that while he was living in Michigan, he was forcibly seized by Michigan officers, handcuffed and blackjacked (flogged) and taken to Michigan. In rejecting the defendants contention that he should be released due to the manner in which Illinois secured his presence in that jurisdiction the Court stated:

> The Court has never departed from the rule announced in *Ker*, that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of forcible abduction. . . . There is nothing in the Constitution that requires a court to permit a guilty person to escape justice because he was brought to trial against his will.

Frisbie, 342 U.S. at 522. Subsequent opinions of the Court hold fast to this doctrine. In *Gerstein v. Pugh*, 420 U.S. 103,

119 (1975), the Court held that an illegal arrest or detention does not void a subsequent conviction. In *United States v. Crews*, 445 U.S. 463, 474 (1980) the court held that

> An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction [(citing *Gerstein, Ker, Frisbie*)]. . . . Respondent is not himself a suppressible "fruit", and the illegality of his detention cannot deprive the government of the opportunity to, prove his guilt through introduction of evidence wholly untainted by the police misconduct.

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984), the Court held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred [citing *Gerstein, Frisbie*]."

II. Exception to the *Ker-Frisbie* Doctrine

Despite these clear, and in some cases recent pronouncements from the Supreme Court, the second and ninth circuits have recognized an exception to the *Ker-Frisbie* Doctrine. In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), the defendant challenged the district court's jurisdiction alleging that he had been kidnapped in Peru, and brutally tortured and interrogated for 17 days, all with the knowledge of the Assistant United States Attorney.[1] The defendant alleged

1. Defendant alleged that he was held for a period of time incommunicado and denied food and water. Later, he was tortured with (Cont'd)

that he was then drugged and flown to the United States. The second circuit court concluded that "due process . . . require[s] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. The case was remanded to the district court which determined without a hearing that it had jurisdiction over the defendant.

The second circuit has subsequently limited the holding of *Toscanino* to cases where the defendant can establish governmental conduct "of the most shocking and outrageous kind." *United States ex rel Lugan v. Gengler,* 510 F.2d 62, 65-66 (2d Cir.) *cert denied,* 421 U.S. 1001 (1975).[2]

A. Ninth Circuit

The ninth circuit has adopted a similar standard defining an exception to the *Ker-Frisbie* doctrine. A defendant must make "a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agent of the United States." *United States v. Lovato,* 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied,* 423 U.S. 985

(Cont'd)
electrodes, pliers, by having alcohol flushed in his eyes and nose, and by having various other fluids forced up his anal passage.

2. In *United States v. Reed,* 639 F.2d 896, 902 (2d Cir. 1981), that same court suggested that the narrow exception may not apply to a fugitive from justice, such as Matta. In denying defendants motion to dismiss, the court noted that defendant was a fugitive. Accordingly, the court stated that "this case is different from one in which jurisdiction is *initially* obtained by illegal means." 639 F.2d at 902 n.2.

(1975). Later the this circuit stated that a defendants must demonstrate governmental conduct "of the most shocking and outrageous kind" to warrant dismissal on due process grounds. *United States v. Valot,* 625 F.2d 308 (9th Cir. 1980).

B. Defining "Grossly Cruel and Unusual Barbarities" of "the Most Shocking and Outrageous Kind"

This Court is not aware of any case in which an indictment has been dismissed under an exception to the *Ker-Frisbie* doctrine. *See also, Matta-Ballesteros v. Henman,* 896 F.2d 255, 261 (7th Cir 1990). However, the ninth circuit has recognized that the conduct alleged in *Toscanino* was "shocking to the conscience." *United States v. Fielding,* 645 F.2d 719, 723 (9th Cir. 1981). The second circuit has suggested that the Toscanino showing is the minimum required showing to invoke the doctrine. *See, United States v. Reed,* 639 F.2d 896, 902 (2d Cir. 1981) (denying defendant's motion finding "there was none of the cruel, inhuman and outrageous treatment alleged suffered by Toscanino"). In *Ker* the defendant was blackjacked by his abductors. The Supreme Court did not find that this conduct warranted dismissal of the indictment. In *United States v. Lira,* 515 F.2d 68 (2d Cir. 1975), the defendant alleged that he was blindfolded by Chilean police, beaten, strapped nude to a box spring, tortured with electric shocks, and questioned. He was then transferred to a Chilean prison where he was beaten and tortured for three weeks. The court did not suggest that this conduct did not constitute outrageous conduct, but found that the defendant had failed to show that the "United States government played [a] direct or substantial role in the misconduct. . . ." *Id.* at 71.

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III. Defendant Has Failed to Make a Strong Showing of Grossly Cruel and Unusual Barbarities

Matta testified that a hood was placed over his head, that he was kicked and that he was shocked four times with a stun gun while being driven from his residence in Honduras where he was arrested, to a U.S. airbase one hour away. Matta was unable to recall what parts of his body were shocked during this drive. Matta's testimony was directly contradicted by the testimony of the U.S. Marshal Morales who was present in the vehicle.

Matta also testified that he was shocked "several times" on his hands, back, feet and groin area while being flown from that airbase to Los Americas Airport in Santo Domingo, Dominican Republic. The flight to Santo Domingo lasted a few hours. U.S. Marshal Escobar testified that no U.S. personnel were on the airplane carrying Matta when it arrived in Santo Domingo. This testimony is corroborated the government's *in camera* filing. Additional testimony established that Matta never complained to the U.S. Marshal's who accompanied him on the remainder of his journey to the federal penitentiary at Marion, and that Matta was in no way abused during this time. The Marshall's testified that Matta's appearance did not suggest that he had been tortured or abused.

Upon his arrival at Marion, Matta was given a medical examination which revealed multiple marks on his back which were described by the examining doctor as "minor skin trauma." The examining doctor also found minor abrasions on his neck, forearms and left foot. The doctor's examination of defendant's genitalia revealed the presence of a depigmented area with some scaling, which the doctor attributed to a superficial fungus infection.

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The Court finds that the defendant has failed to make "a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agent of the United States." *Lovato,* 520 F.2d at 1271. Defendant's allegations of mistreatment, even if taken as true, do not constitute such barbarism as to warrant dismissal of the indictment under the caselaw. Further, though it would not be unreasonable to infer from the evidence presented that the flight crew of airplane which flew Matta to Santo Domingo were paid agent of the United States government, defendant has not made a "strong showing" of U.S. participation in the alleged acts. Accordingly, defendant's motion is denied.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: June 29, 1990

s/ Edward Rafeedie
EDWARD RAFEEDIE
United States District Judge